91-1891

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ELIZABETH CARLISLE, et al.
Petitioners

v.

BERNARD BRADSHAW, et al.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourteenth Amendment of the United States Constitution prohibit the Town of Monroe from ordering the permanent discontinuance of the entire Town sewer system and compelling the disconnection of all properties served?

2. Does the permanent discontinuance of the entire Town sewer system and disconnection of all properties served deprive the users of a property right in violation of the United States Constitution?

3. May the Town of Monroe, in seeking to satisfy the mandates of the Federal Clean Water Act, abandon the public sewer system thereby depriving a minority of persons of their property rights, while the majority bears no costs?

LIST OF PARTIES TO THE CASE

Elizabeth Carlisle, James DeWitt, Joyce DeWitt, Harold Eastman, June Eastman, Douglas Gilmour, Jerome Gresley, Grace Gresley, Mildred Holcomb, Mildred Holcomb, Alan Hughes, Catherine Hughes, Reginald Hunt, Margaret Hunt, Richard Kleinfelder, Margo Kleinfelder, Paul McDonnell, Carol E. McDonnell, Sally Mitchell, Laurence Moore, Katherine Moore, Forrest Parker, Lothar Riba, Shirley Rice, Rex Ryan, Loria Ryan, Philip Vielleux, Harold Whipple and Beverly Whipple[1]

v.

Bernard Bradshaw, Leslie Morrison and Robert Wormer, Individually, and as Selectmen, and the Town of Monroe

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[1]At the State level, this case was entitled *Adams, et al. v. Bradshaw, et al.* Since that time Raymond Adams has withdrawn from the case, along with the following: Betty Adams, Philip Basch, Irene Basch, Guy Burrill, Marjorie Burrill, Larkin Burrill, Amy Burrill, David Choate, Stephen Dana, Malcolm Grimes, Eleanor Grimes, Harriet Hinman, Dexter Johnson, John Kaye, Lillian Kaye, Francesca Riba

TABLE OF CONTENTS

Questions Presented for Review 1
List of Parties to the Case 2
Opinions Below 7
Jurisdiction 7
Constitutional Provision Involved 7
Statement of the Case 8
Jurisdictional Statement 9
The Questions Presented Are Substantial 11
I. The State Supreme Court Erred in Holding That the Interest of the Plaintiffs in the Municipal Sewage Disposal System Was Merely a License 11
II. A Municipality Should Not be Allowed to Terminate An Expectancy Interest in a Government Service That Landowners Are Required to Obtain 13
III. Entitlements in Utility Services Are Protected Property Rights 15
A. Under New Hampshire Law There is an Expectancy Interest in the Continued Maintenance of Public Sewers 18
IV. The Facts in the Instant Case Support the claim That the Residents of the Village Have Entered Into an Implied Agreement for the Ongoing Provision and Maintenance of a Sewage Disposal System. Implied Agreements Are a Type of Property Right Protected Under the United States Constitution 19
V. The Disconnection of the Plaintiffs' Sewer Connections From the Municipal Sewage Disposal System Effectuates A Taking of the Plaintiffs' Real Property 22
VI. In an Attempt to Comply with Federal Environmental Legislation, the Town Unjustly Deprived the Plaintiffs of Their Property Rights 25
VII. In Exercising Its Police Power the Town Has Deprived the Village Residents of Equal Protection of the Laws 27
Conclusion 28

Certificate of Service 30
Appendix A - Petition for Declaratory Judgment and Bill in Equity 31
Appendix B - Motion to Amend Plaintiffs' Petition and Request for Prompt Hearing on the Merits 38
Appendix C - Order of the Grafton County Superior Court, Docket No. 88-E-107, dated March 13,1990 47
Appendix D - Order of the New Hampshire Supreme Court, Docket No. 90-298, dated November 7, 1991 64

TABLE OF AUTHORITIES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 12, 24, 25
Armstrong v. United States, 364 U.S. 40 (1960) 11, 23
Board of Regents v. Roth, 408 U.S. 564 (1972) 14, 16
Branum v. Clark, 927 F.2d 698 (2nd Cir. 1991) 22
Bronson v. Consolidated Edison Co. of New York, Inc., 350 F.Supp. 443 (S.D.N.Y. 1974) 18
Camp v. Village of Barre, 29 A. 1022 (1984) 12, 26
Chicago B&O Railroad Co. v. Illinois, 200 U.S. 561 (1905) 11
Condosta v. Vermont Electric Cooperative, Inc., 400 F.Supp. 358 (D. Vt. 1974) 18
Craft v. Memphis Light, Gas and Water Division, 534 F.2d 684 (6th Cir. 1976) 18
Davis v. Weir, 328 F.Supp. 317 (N.D. Ga. 1971), aff'd 497 F.2d 139 (5th Cir. 1974) 18
DiMassimo v. City of Clearwater, 805 F.2d 1536 (CA 11, 1986) 15, 16
Donnelly v. City of Eureka, 399 F.Supp. 64 (D. Kan. 1975) 18
Dunn v. Blumstein, 405 U.S. 330 (1972) 28
Goss v. Lopez, 419 U.S. 565 (1975) 16, 17
Hattell v. Public Service Company of Colorado, 350 F.Supp. 240 (D. Colo. 1972) 18
Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 26
Koger v. Guarino, 412 F.Supp. 1375 (1976) 16, 17

Lamb v. Hamelin, 57 F.R.D. 58 (D. Minn. 1972) 18
LaSalle National Bank & Trust v. City of Chicago,
470 N.E.2d 1239 (1984) 13, 26
Limuel v. Southern Union Gas Co.,
378 F.Supp. 864 (W.D. Texas 1974) 18
Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) 24, 25
Lynch v. United States, 292 U.S. 559 (1934) 21, 22
Maryland v. Garrison, 480 U.S. 79 (1987) 10
Memphis Light, Gas & Water Div. v. Craft,
436 U.S. 1 (1978) 15, 16
Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 12, 24, 25
Oliver V. United States, 466 U.S. 170 (1984) 11
Penn Central Transportation Co. v City of New York,
438 U.S. 104 (1978) 23
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 27
Perry v. Sindermann, 408 U.S. 593 (1972) 21, 22
Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984) 11
Shapiro v. Thompson, 394 U.S. 618 (1969) 28
Stanford v. Gas Service Co., 346 F.Supp. 717
(D.Kan. 1972) 18
Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) 17
United States v. Carrolene Products Co.,
304 U.S. 144 (1938) 27
United States v. General Motors Corp.,
323 U.S. 373 (1945) 11
Village of Menomonee Falls v. Michelson,
311 N.W.2d 658 (1981) 13, 26
West Chicago S.R. Co. v. Illinois, 201 U.S.
506 (1906) 11
Williamson County Regional Planning Commission
v. Hamilton Bank, 473 U.S. 172 (1985) 9
Zablocki v. Redhail, 434 U.S. 374 (1978) 28

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution
Fifth Amendment 7
Fourteenth Amendment 7
New Hampshire Constitution
Part I, Article 12 10
New Hampshire PL 95:3 19
New Hampshire RSA 147:1 19
New Hampshire RSA 147:8 18
28 U.S.C., Section 1257 7
42 U.S.C., Section 1983 9
42 U.S.C., Section 1988 9

OTHER AUTHORITIES

Michelman, Frank I., "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harvard Law Review, 1165-1258 (1968) 28
Restatement (Second) Torts, Section 821 26

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court dated November 7, 1991 is appended hereto as Appendix D. The opinion of the Grafton County Superior Court was entered on March 13, 1990 and is appended hereto as Appendix C.

JURISDICTION

The decision sought to be reviewed was made and entered on November 7, 1991. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1, Clause 2:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In addition, the United States Constitution, Fifth Amendment "Taking" Clause, which is made applicable to the states through the Fourteenth Amendment:

> "No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

In 1932, the Town of Monroe (hereinafter referred to as the "Town") voted to construct and install a sewer system in the village area (hereinafter referred to as the "Village"). Since 1932 and the construction of the Town sewer, an estimated twelve (12) additional buildings have been added, including the Monroe Town Hall and an addition to the Monroe School. The Town sewer presently serves an estimated 45 single-family homes, the Town Hall, the Town Library, the Town Fire Station, the Monroe School with a present enrollment of 101 students, the Town medical clinic, a bank, a church and a store.

The Town has appropriated money each year for the maintenance of the Town sewer. In 1971, a capital reserve fund for the purpose of a sewer disposal unit was established by Town vote. For a period of twelve (12) years money was appropriated and placed in this capital reserve fund. As of November 1987, there was approximately $200,000 in the fund.

The Special Town Meeting of February 10, 1989 voted to abandon the Town sewer and to authorize the Selectmen of the Town, the governing board, to issue cease and desist orders to the current users of the Town sewer.

The Plaintiffs in this case had filed their original Petition on July 19, 1988, prior to the Town Meeting vote in February 1989. This original Petition contained allegations of fact with regard to the action of the Board of Selectmen and pressed for the presentation to a Town Meeting of alternatives other than the discontinuance of the Town sewer. After the Town Meeting of February 10, 1989, the Plaintiffs amended the original Petition by adding Counts II and III, which Counts related directly to the action of the Town Meeting discontinuing the Town sewer.

The trial court denied all of the requests for relief of the Plaintiffs but ruled that the Town's action discontinuing the Town sewer constituted inverse condemnation of property rights of the users. On appeal, the New Hampshire Supreme

Court reversed the trial court on the issue of inverse condemnation and affirmed the trial court's denial of all other requests for relief by the Plaintiffs.

JURISDICTIONAL STATEMENT

The questions herein were raised initially in the Petition of Declaratory Judgment and Bill in Equity filed by the Plaintiffs on July 19, 1988. In paragraph 19 of their Petition, the Plaintiffs alleged that the action of the Defendants had violated their Federal constitutional rights of equal protection and due process.[2] In paragraph 20 of the Petition, the Plaintiffs requested remedial relief for the depravation of their rights as guaranteed under the Federal Constitution.[3]

The Petition provided detailed allegations of fact regarding the actions of the Defendants, which resulted in the depravation of the property rights of the Plaintiffs. It is important to note that under New Hampshire law, constitutional and legal remedies are shaped by the allegations of fact, not necessarily the relief requested.

In keeping with the requirements of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Plaintiffs sought judicial relief and the trial court, the Grafton County Superior Court, granted an inverse

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[2]Paragraph 19 of the Plaintiffs' Petition reads as follows:
"19. The Defendants, the Selectmen, by their action described herein have violated the Plaintiffs' Federal constitutional rights of equal protection and due process."

[3]Paragraph 20 of the Plaintiffs' Petition reads as follows:
"20. The Defendants, the Selectmen, under color of State law and local authority, have subjected the Plaintiffs to be deprived of rights, privileges or immunities secured by the Federal Constitution and Federal laws and are liable to the Plaintiffs for compensatory damages under 42 U.S.C. Section 1983, and for the award of attorneys fees under 42 U.S.C. Section 1988."

condemnation remedy on the grounds that the abandonment of the Town sewer constituted a taking under the New Hampshire Constitution, part I, article 12.[4] The New Hampshire Constitution requires that there be just compensation when the government, through the use of the police power, takes private property. The trial court found that the Town was properly exercising its police power. Furthermore, the trial court found no violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution. Finally, the court held that the Plaintiffs had a vested right to the use of the sewer system and that the abandonment of that system would substantially deprive them of the use and enjoyment of their property. In short, the trial court found that the Town's decision to abandon the sewer constituted a regulatory taking by inverse condemnation for which the property owners could bring an action to determine damages (see Appendix C, Superior Court Order at page 16).

The New Hampshire Supreme Court reversed the decision of the superior court and held that the Plaintiffs had no property rights in the connection to the Town sewer system. The New Hampshire Supreme Court admitted that this was a case of first impression in the State, but unlike the superior court did not base its decision on New Hampshire common law principles. Rather, the State supreme court, after citing the New Hampshire Constitution, part I, article 12, applied common law principles from other jurisdictions.

The United States Supreme Court has held that it has jurisdiction to hear cases when a State court decision rests upon a state constitutional provision that is similar to the Federal Constitution. *Maryland v. Garrison*, 480 U.S. 79 (1987). As the provision of the New Hampshire Constitution concerning the taking of property is similar to that of the United States Constitution, this Court has jurisdiction to hear this case.

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[4]The pertinent portion of the New Hampshire Constitution, Part 1, Article 12 reads as follows: "...no part of a man's property shall be taken from him, or applied to public uses, without his consent..."

Furthermore, although an independent state ground prevents review by the U. S. Supreme Court, the state court cannot divest the Supreme Court of jurisdiction by merely basing its decision on state law principles when constitutional issues are present. *Oliver v. United States*, 466 U.S. 170 (1984) and *West Chicago S.R. Co. v. Illinois*, 201 U.S. 506 (1906). If the state ground does not appear adequate to the Supreme Court, then it will grant the petition for certiorari. Finally, if a state court disposes of a case on state grounds, when a ruling upon a federal issue would have led to a different result, the state ground is deemed inadequate and the Supreme Court may hear the case. *Chicago B&O Railroad Co. v. Illinois*, 200 U.S. 561 (1905).

In the instant case, the New Hampshire Supreme Court, in reversing the trial court's finding of inverse condemnation, did not base its decision on any principle of New Hampshire law, but rather cited common law from other jurisdictions when a Federal constitutional issue was present.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The State Supreme Court Erred in Holding that the Interest of the Plaintiffs in the Municipal Sewage Disposal System Was Merely a License.

The New Hampshire Supreme Court found that the only property interest of the Plaintiffs in their connections to the Town sewage disposal system was a license. However, closer analysis reveals that the Plaintiffs have at least several "sticks" of property rights in their Town sewage disposal connections. One is undoubtedly a license; the others are an expectancy interest in the continued operation and maintenance of the system and an implied agreement between the Town and its residents. The Supreme Court has held that intangible property rights are deserving of the protection of the Taking Clause. *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Armstrong v. United States*, 364 U.S. 40 (1960); and *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

If any one "stick" in the "bundle of rights" held by an owner of property is taken by the government, compensation may be required if the value of his property is significantly diminished. *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In this case the abandonment of the Town sewage disposal system has deprived the Plaintiffs of a property right in their connections to the Town sewer which has significantly diminished the value of their homes and properties.

The New Hampshire Supreme Court relied solely on cases from other states to support its finding that the only relevant property interest of the Plaintiffs was a license. However, all those cases relied on by the court involved a single user or landowner disconnected from a public sewer system as a result of a defect or violation occurring upon the property of the user. None of those cases involved the permanent discontinuation of a municipal sewer system.

The State court relied heavily on *Camp v. Village of Barre*, 29 A. 1022, 66 Vt. 563 (1894), which involved the connection between Mr. Camp's drainage pipe and the municipal sewer. Public health officials had determined that harmful sewer gases originated from a defect in the plumbing in Mr. Camp's house. Mr. Camp was ordered to disconnect the faulty drain and reconnect to the system. The quoted segment of the case cited by the New Hampshire Supreme Court omitted a sentence critical to a full understanding of the case.

> "The bailiffs clearly had a right to discontinue its use. Their only interference with the plaintiff's drain, in which he had a property right, was to require him **to disconnect from the old sewer and connect with the new one**. The arrangement . . ." *Camp* at page 568. (Emphasis added.)

Thus, the plaintiff's license to connect to the public sewer was conditioned on the proper functioning of his plumbing. While he was prohibited from continuing to disrupt the system, he was

not permanently barred from using the public sewer.

The other cases cited by the New Hampshire Supreme Court involved similar situations. In *La Salle National Bank & Trust v. City of Chicago*, 470 N.E.2d 1239 (1984), the plaintiff bank was ordered to discontinue its old connection with the public sewer system and reconnect at a new location to prevent the overflow of raw sewage into the Chicago River during heavy rainstorms. In *Village of Menomonee Falls v. Michelson*, 311 N.W. 2d 658 (1981), the defendant landowner was ordered to disconnect from the public sewage system because she was found to be in violation of a local ordinance which disallowed rain or surface water to be discharged into the system. If found to be in compliance, the defendant would be permitted to reconnect.

All these cases stand for the proposition that users of a public sewage system are required to adhere to the regulations of the public sewer authorities, which are designed to ensure the continued and efficient functioning of the public system. If an user violates the local regulations he may be ordered to disconnect until such time as he comes into compliance. Such an order is neither unreasonable nor deprives a landowner or user of his or her expectancy interests in the continued functioning of the sewage disposal system. No court yet has deprived landowners of their expectancy rights in the continued operation of a public sewage disposal system.

II. **A Municipality Should Not be Allowed to Terminate an Expectancy Interest in a Government Service that Landowners are Required to Obtain**.

Expectancy interests are created when the government requires a property owner to take specific actions and in return provides a service to that property owner for a prolonged and uninterrupted period of time.

After the construction and installation of the Town sewer, State law required property owners to connect to the Town

sewer if located within 100 feet. As a result of the continued compliance by the Village residents and the uninterrupted service provided by the Town, the residents of the Village have come to depend upon the sewage disposal system and expect that the system will remain operative. This expectancy interest in the continued operation and maintenance of the sewage disposal system is a protected property right. As the Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

> "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives."

This case presents important questions of public policy that could affect numerous municipalities throughout the nation. The mandates of the Clean Water Act and the Safe Drinking Water Act impose heavy financial burdens on municipalities to improve and upgrade water systems and sewage systems without the massive Federal assistance that had previously been available. Municipalities are now required to shoulder financial burdens formerly paid for by state and Federal grants.

Faced with these financial realities, voters in municipalities, as well as users of water and sewer systems, must be informed of what is constitutionally permitted and constitutionally prohibited in the choice of alternatives to comply with Federal mandates without Federal grants. Can the voters of a municipality, when confronted with the choice of paying the bill to upgrade and improve water and sewer systems, avoid the cost by terminating those municipal services and shifting the burden to individual property owners?

When confronted with ever increasing tax burdens, there is a strong inclination to avoid additional expenses by shifting the responsibility to individual property owners. If, however, there is a price to be paid for shifting that burden in the form of compensation for loss of property rights, then the range of choices and decision making must take into account all of the

possible costs. There may be situations where it would be less expensive for the municipality to compensate a small number of property owners. It may be that the cost of compensating property owners is equal to or more than the cost of paying for the improvements to comply with the mandates of Federal statutes.

III. **Entitlements in Utility Services are Protected Property Rights**.

In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), the Supreme Court addressed the issue of whether a customer of the petitioner had a Fourteenth Amendment protected property interest in continued utility service. The petitioner, a municipal utility subject to the ultimate control of the City of Memphis government, was statutorily exempted from regulation by the state public service commission. The respondents owned a home and resided in Memphis. As a result of a malfunctioning meter system, the respondents continually received double bills. Although they regularly paid their first bill the petitioner repeatedly terminated their electric service for nonpayment of the second bill.

The Supreme Court found that Tennessee law did not permit a public utility to terminate service at will and provided injunctive relief or damages for aggrieved utility customers. The existence of these local remedies provided sufficient evidence for the Court to rule that the State had recognized and provided its citizens with a protected interest in continued utility service. The Court thus held that the respondents had successfully asserted a legitimate claim of entitlement within the protection of the Fourteenth Amendment. *Memphis Light* at page 12.

In *DiMassimo v. City of Clearwater*, 805 F.2d 1536 (CA 11, 1986), the court was asked to decide whether the defendant City had wrongfully deprived the plaintiffs of water and gas services. The plaintiffs were tenants in rental properties served by the City utility services. At the request of their landlords the

City disconnected the water and gas services of the plaintiffs without notice. All parties appealed the decision of the district court. The City argued that the court erred in finding that the plaintiffs had a protected property interest in continued utility service.

In upholding the finding of the trial court, the *DiMassimo* court found that Florida law specifically required a landlord of a dwelling of the type occupied by the plaintiffs to provide tenants with running water, even when the failure to do so would amount to constructive eviction. According to the court Florida law,

> "would not sanction the withdrawal of water services . . . because such action would constitute either the failure to provide necessary facilities for sustaining life or the constructive eviction of tenants contrary to statutory directives for such action. Therefore, under the definition of 'property interest' commonly used for section 1983 purposes . . . (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972) the actual users of water utilities service may have protectable interests." *DiMassimo* at page 1538.

The court found additional support for its opinion by noting that the "Supreme Court had recognized that the cessation of essential services for any appreciable time works a uniquely final deprivation." *DiMassimo* at page 1539 quoting *Memphis Light, supra*.

In *Koger v. Guarino*, 412 F.Supp. 1375 (1976), the Court of Appeals adopted the due process analysis used by the U.S. Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975), and applied it to a case involving the termination of water services by the City of Philadelphia.

In *Goss*, the Supreme Court was faced with determining the issue of whether students facing temporary suspension from a public school had a property interest that qualified for protec-

tion under the Fourteenth Amendment. The Court held that the students had a legitimate entitlement to a public education and that their property interest in educational benefits could not be temporarily denied in violation of the Fourteenth Amendment. In reaching its holding, the Court examined Ohio State law and found that local authorities were required to provide a free education to all residents between five and twenty-one years of age. According to the Court:

> "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures... Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door." *Goss v. Lopez*, at page 574, quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969).

The *Koger* court found that the provision of municipal water services were indispensable for the advancement of the health and welfare of a modern society. The court held that:

> "A water user has a legitimate claim of entitlement to continued water service which is a property interest to which due process clause of the Fourteenth Amendment applies... Although the defendants are not constitutionally obligated to establish and maintain water service for the benefit of their citizens, once having done so, a user has a legitimate claim of entitlement to continued service absent sufficient cause for termination consistent with the procedural protections of the due process clause. Certainly, the right to receive water service is not a de minimis property interest... Indeed, many courts which have considered the issue have agreed that utility users

possess a constitutionally protected interest in continued utility service."[5]

A. Under New Hampshire Law There is An Expectancy Interest in the Continued Maintenance of Public Sewers.

With respect to the instant case, it is clear that an expectancy interest in continued municipal sewage disposal services has been created under New Hampshire law. Under RSA 147:8 no person is permitted to occupy or lease any building or portion of a building,

> "unless said building shall be provided with suitable drains or sewers for conveying waste water and sewage away from the premises **into some public sewer**, if there be one within 100 feet thereof... The phrase public sewer, as used in this chapter, shall be understood to mean any sewer constructed and maintained by taxation, or any sewer which is open for general use upon the payment of a rental, license or other fee."[6] (Emphasis added.)

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[5]The *Koger* court cited the following cases for the proposition that the continuation of a utility service was a protected property right under the Fourteenth Amendment.

Craft v. Memphis Light, Gas and Water Division, 534 F.2d 684 (6th Cir. 1976); *Palmer v. Columbia Gas of Ohio*, Inc., 479 F.2d 153 (6th Cir. 1973); *Condosta v. Vermont Electric Cooperative, Inc.*, 400 F.Supp. 358 (D.Vt. 1974); *Donnelly v. City of Eureka*, 399 F.Supp. 64 (D.Kan. 1975); *Limuel v. Southern Union Gas Co.*, 378 F.Supp. 964 (W.D. Texas 1974); *Davis v. Weir*, 328 F.Supp. 317 (N.D. Ga. 1971) aff'd 496 F.2d 139 (5th Cir. 1974); *Bronson v. Consolidated Edison Co of New York, Inc.*, 350 F.Supp. 443 (S.D.N.Y. 1972); *Hattell v. Public Service Company of Colorado*, 350 F.Supp. 240 (D.Colo. 1972); *Lamb v. Hamelin*, 57 F.R.D. 58 (D.Minn. 1972); *Stanford v. Gas Service Co.*, 346 F.Supp. 717 (D.Kan. 1972).

[6]This provision of RSA 147:8 has been in effect and remained unchanged since before 1932, the year when the Town of Monroe installed its sewage disposal system.

There is no express provision under New Hampshire law or the Town ordinances for the termination of the entire public sewer system. On the contrary, a review of New Hampshire law and its legislative history indicates a trend towards requiring and encouraging additional steps to be taken to connect to public sewage disposal and treatment systems. Thus, in 1985 the New Hampshire General Court amended RSA 147:8 by adding the following sentence:

> "Nothing in this section shall prohibit cities, towns, or village districts, by ordinance or by regulation under RSA 147:1, (local regulation by health officers) from increasing the 100-foot distance contained in this section."

IV. **The Facts of the Instant Case Support the Claim that the Residents of the Village Have Entered Into an Implied Agreement for the Ongoing Provision and Maintenance of a Sewage Disposal System. Implied Agreements are a Type of Property Right Protected Under the United States Constitution.**

In the instant case there exists an implied agreement between the Town and property owners in the Village for the maintenance and improvement of a sewage disposal system. This implied agreement is based upon the establishment and funding of a special Capital Reserve Fund as well as other acts of the Town.

In 1932 the Town voted to construct and install a sewer system in the Village. At that time, the construction of a public sewer system was authorized, but not obligatory under PL 95:3. The sewage collection system was installed in the Village in 1932. As a result wastewater from buildings was collected and discharged without treatment into the Connecticut River. Since 1932 the Town has appropriated money annually for the maintenance of the Town sewer system.

At the Annual Town Meeting in 1971 the Town voted to

establish a Capital Reserve Fund for the purpose of constructing a sewage treatment and disposal facility. From 1971 through 1981, inclusive, residents voted at the Annual Town Meeting to appropriate money for the Capital Reserve Fund. In 1975 and 1977 the Town voted to expend money for the purpose of preparing plans and specifications for sewage treatment facilities to comply with Federal water pollution control regulations. By 1987 the Capital Reserve Fund totalled approximately $200,000.

Property owners have developed their land in the Village with the mutual understanding of the Town government that the Town would at a minimum maintain the Town sewer system. The Town fostered this understanding by refusing to allow landowners to install on-site septic systems and requiring connection to the Town sewer.

In short, the Town voted to provide financing for the eventual improvement of the sewer system and came to rely on the sewer service. The property owners in the Village had more than an unilateral expectation of the continuation of the sewer services. The voters took affirmative acts to ensure that the sewer system would continue on into the future. The Town concurrently held this view as it required new structures to connect to the sewage system. These actions gave rise to an implied agreement between the property owners and the Town that the Town would continue indefinitely to have a functioning Town sewer system.

The existence and enforcement of State and local regulations further reinforced the mutual belief of the Village residents and Town officials that the Town sewer system would be maintained and extended when necessary.

The U.S. Supreme Court has stated that

> "a person's interest in a benefit is a 'property' interest for due process purposes if there are rules or mutually

> explicit understandings that support his claim of entitlement to the benefit."

Perry v. Sindermann, 408 U.S. 593, 601. In *Lynch v. United States*, 292 U.S. 559 (1934), the Court held that Congress could not cancel government issued war risk life insurance policies as a response to the economic crisis of the Depression.

The plaintiff in *Lynch* was a beneficiary under a government insurance policy issued during World War I pursuant to the War Risk Insurance Act of 1917. The insured had been totally and permanently disabled and was entitled to compensation under the policy, but the government refused to make payment. The Court found that although term insurance had been issued at very low premium rates, the government had developed and promoted War Risk Insurance in large measure to avoid the necessity of granting pensions. *Lynch*, footnote 2 at page 576. In return for the government's obligation, the insured paid prescribed monthly premiums. Although the Court found that this arrangement was "not entered into by the United States for a business purpose," it determined that the war risk insurance policies were contracts of the United States. According to the Court:

> "In order to effect a benevolent purpose heavy burdens were assumed by the government. But the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents." *Lynch*, at page 576.

Justice Brandeis, in writing for the majority, declared that the terms of the contracts were found in part in the insurance policy, and in part in the statutes under which they were issued and the regulations promulgated thereunder. The Court held that rights arising out of a contract with the government are protected by the Fifth Amendment and that the government could not cancel its obligations under the policy without making just compensation.

Interestingly, the Court discussed the climate in which Congress took action to repeal the rights guaranteed to the beneficiaries of the war risk insurance policies. The Act of Congress passed in March 1933 was entitled "An Act to Maintain the Credit of the United States" and was popularly known as the Economy Act. The Court stated:

> "No doubt there was in March 1933 great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation." *Lynch* at page 580.

While the *Lynch* court found that an express agreement was a protected property right, other courts have found protected property rights in implied agreements. See: *Perry v. Sindermann*, *supra*, and *Branum v. Clark*, 927 F.2d 698 (2nd Cir. 1991), holding that New York law recognizes an implied contractual agreement between an academic institution of higher learning and its students to act in good faith. Such an implied agreement is a property interest entitled to constitutional protection.

V. **The Disconnection of the Plaintiffs' Sewer Connections from the Municipal Sewage Disposal System Effectuates a Taking of the Plaintiffs' Real Property**.

The foregoing arguments demonstrated that the Plaintiffs have a Fourteenth Amendment property right in their connections to an operative municipal sewage disposal system. That is, the government cannot refuse to terminate municipal sewage disposal services because of the existence of the Plaintiffs'

entitlements and the implied agreement between the Plaintiffs and the government. This Fourteenth Amendment property right must be considered one of the essential "sticks" in the "bundle of rights" associated with the ownership of a parcel of land in the Village. By depriving the Plaintiffs of their right to be connected to an operable municipal sewage disposal system, the Town has effectuated a taking of their real property.

This assertion is supported by the findings of the trial court (the following are all contained in Appendix C). There are a number of lots with residential buildings that will have no means of disposing of their human waste and wastewater. Furthermore, the trial court found that such residences would be uninhabitable and that the value of these properties would be substantially reduced, resulting in large losses to their owners. The court specifically found that disconnection from the Town sewer and the installation of on-site septic systems would restrict the use and enjoyment of many properties. Finally, the disconnection of the Town sewer system not only affects residential but also commercial and public-service related uses such as a school, medical clinic, bank and Town offices.

For those parcels of property that will be substantially reduced in use and value, the Constitution guarantees that the landowners shall be properly compensated for the taking. The U.S. Supreme Court has recognized that a fundamental purpose and guarantee of the Fifth Amendment "Taking" clause is to "bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (Rehnquist, J. dissenting); *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Justice demands that the costs of complying with Federal legislation in the form of the Clean Water Act, not be placed unfairly upon the Plaintiffs. It is unlikely that the U.S. Congress in passing the Clean Water Act envisioned that municipalities would attempt to avoid compliance by terminating

their municipal sewage services and requiring individual landowners to deal with the consequences. The consequences are clear: the property owners will be burdened with large costs or be required to leave their homes.

The decision of the Town to abandon municipal sewage disposal services acts as a regulatory taking of property. The U.S. Supreme Court has held that regulatory takings of property require compensation under the Fifth Amendment, if the taking does not substantially advance legitimate state interests or denies an owner economically viable use of his land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

There appears to be only one reported case throughout the United States which involved the issue of whether the denial of a public utility service by the government constituted a taking of property. In *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990), the Court of Appeals was faced with the issue of whether a moratorium on new water hookups enacted by a community public utility district constituted a regulatory taking of the appellants' property in violation of the Fifth Amendment. The individual appellants in the case had all purchased undeveloped land zoned for residential use in a community located in Marin County, California. The evidence revealed that Marin County conditioned the granting of building permits on the securing of water hookup permits from the community public utility district. The refusal of the public utility district to grant the appellants a water hookup prohibited them from building anything on their land.

As the appellants had raised triable issues of fact regarding the existence of a water shortage, the court stated that the withholding of available supplies of water from land zoned exclusively for residential use might interfere with the landowner's reasonable investment backed expectations by preventing all practical use of that land. See *Lockary* at page 1155. The court remanded the case for a determination of what

constituted an economically viable use of the land of the appellants.

The *Lockary* court utilized the analysis put forth by the U.S. Supreme Court in *Agins* and *Nollan*. It stated that if the public utility district's failure to grant water hookups did not substantially advance a legitimate state interest and denied the appellants the economically viable use of their land, then the acts of the utility district would constitute an unconstitutional taking requiring compensation. The principle derived from *Lockary* is that if a community denies a landowner the use or provision of essential utility services, which interfere with the landowner's reasonable investment backed expectations preventing typical use of the land, then an unconstitutional taking will have occurred.

In the instant case, a sewage disposal system is available to the Town. The abandonment of that sewage disposal system would result in an unconstitutional taking of the property of the Plaintiffs as it would interfere sufficiently with their investment backed expectations. As noted earlier, State and local law required the Plaintiffs to connect their properties to the sewage disposal system of the Town, and failure to connect would result in the denial of a building or occupancy permit. The parcels of property in the Village are generally of a size and character that would only permit residential use. If the Town ceases to permit property owners to connect to the sewage disposal system, then as the trial court found the value of their properties would be greatly diminished.

VI. **In an Attempt to Comply with Federal Environmental Legislation, the Town Unjustly Deprived the Plaintiffs of Their Property Rights.**

The New Hampshire Supreme Court found additional justification in the decision of the Town to abandon its sewage disposal system on the grounds that the Plaintiffs were causing a nuisance. It is unfair and improper to hold the Plaintiffs responsible for the creation of a nuisance.

First, it is important to recognize that there were no public health hazards or violations of the law proximately caused by or arising out of the connections of the Plaintiffs with the Town sewer system. The Plaintiffs were not found to: (1) have defective plumbing connections as in *Camp v. Village of Barre*, *supra*; (2) be causing the system to overflow as in *La Salle National Bank & Trust v. City of Chicago*, *supra*; or (3) be placing forbidden substances in the system as in *Village of Menomonee Falls v. Michelson*, *supra*. Finally, under State law, RSA Chapter 147, the Plaintiffs were required to connect to the sewage disposal system. Compliance with statutory or administrative regulation is considered a defense to a nuisance claim. RESTATEMENT (SECOND) TORTS, SECTION 821. Thus, it cannot be said that the license rights of the Plaintiffs were giving rise to the creation of a nuisance.

If a nuisance exists, it is due to the discharges of raw sewage into the Connecticut River by the Town. The Town failed to install any sewage treatment system and therefore was responsible for the discharges of raw sewage. The action of the Town in discontinuing the sewage disposal system is a regulatory effort to abate a nuisance. This regulatory response has caused the Plaintiffs to be deprived of their investment backed expectations in their property. As Chief Judge Rehnquist has warned

> "We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labelling it nuisance regulation." *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C. J. dissenting)

It is quite convenient for a local unit of government to comply with Federal legislation respecting water pollution by abdicating all responsibility for the maintenance of its sewage disposal system and leaving Village residents to deal with the consequences. This method of compliance, which ostensibly is an attempt to improve the public condition, is a substantial departure from the established policies of the Town and the

State, which for decades has required landowners to connect to the public sewage disposal system. We are reminded of what the Supreme Court has said about government attempts to alter policies that impinge upon private property rights.

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving that desire by the shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 400 (1922).

In shedding its responsibilities for protecting public health and sanitation by abandoning a functional public sewage disposal, the Town has deprived Village residents of their expectancy interests and has breached an implied agreement to maintain the sewage disposal system thereby depriving the Plaintiffs of their investment backed expectations in the parcels of land located in the Village.

VII. In Exercising its Police Power the Town has Deprived the Village Residents of Equal Protection of the Laws.

This case demands careful judicial scrutiny because the users of the Town sewage disposal system are residents in the Village, which forms a geographically and numerically discrete minority in the Town. As Justice Stone stated in the *Carrolene Products* case, presumptions regarding the constitutionality of exercises of the police power require more searching judicial scrutiny when fundamental rights are infringed and discrimination against "discrete and insular minorities" exists. See: *United States v. Carrolene Products Co.*, 304 U.S. 144, 152, fn. 4 (1938).

The Town Meeting of February 1989 resulted in the passage of local legislation terminating the Town sewage disposal system. As argued above, by exercising its police powers in this manner the Town deprived the Village minority of their funda-

mental property rights and effectuated a taking of their land. These circumstances mandate that the Town Meeting legislation be upheld only upon a showing of some compelling governmental interest incapable of achievement through some less intrusive means. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Dunn v. Blumstein*, 405 U.S. 330 (1972); and *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The Town has voted to come into compliance with Federal environmental legislation by terminating the sewer connection rights of the minority residing in the Village. Thus, the majority effectively has obtained the benefits of a cleaner Connecticut River in their backyards at no additional cost. For the minority, however, a cleaner river will have exacted a high price: they will be deprived of the use and value of their real property and homes. If a less intrusive means of complying with the Clean Water Act is not available, then the Plaintiffs should be compensated for the loss of their property rights.

The test for compensability is fairness. See: Michelman, Frank I., *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARVARD LAW REVIEW 1165-1258 (1968). This Court needs to determine whether it is fair to permit the government to implement a policy that places a great burden on a minority of landowners, by depriving them of their property rights, to achieve the social benefit of a cleaner environment at no cost to the majority. Fairness demands assurances that society will not act to inflict such burdens on a discrete group of property owners unless compensation is made to them.

CONCLUSION

By voting to abandon its long established public sewage disposal system, the Town of Monroe has deprived the Plaintiffs of their expectancy interests in the continued maintenance of the sewage system and has breached an implied agreement with the Plaintiffs. In depriving the Plaintiffs of their property

interests in their sewage connections the Town has effectuated a taking of their real property.

A discrete minority within the Town has been forced to bear the costs for the implementation of Federal environmental legislation.

By withdrawing a vital government service such as the provision of a public sewage disposal service, the Town has made it difficult, if not impossible, for people to come together to live as a community in a healthy and sanitary condition.

To preserve the protection the Constitution intended for private property owners and to ensure that a minority is not discriminated against, the Plaintiffs pray that this Court grant certiorari and that the judgment below be reversed.

Dated this 31st day of January, 1992.

Respectfully submitted,
Elizabeth Carlisle, et al.
By their attorneys,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been mailed via first class mail, postage prepaid, to Kevin R. Bruno, Esq., 37 Court Street, Woodsville, NH 03785 and Edward M. Van Dorn, Jr., Esq., 27 Central Street, Woodsville, NH 03785.

James C. Cleveland, Esq.

APPENDIX A

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

GRAFTON, ss. DOCKET NO.

RAYMOND ADAMS, BETTY ADAMS, PHILIP BASCH, IRENE BASCH, GUY BURRILL, MARJORIE BURRILL, LARKIN BURRILL, AMY BURRILL, ELIZABETH CARLISLE, DAVID CHOATE, STEPHEN DANA, JAMES DeWITT, JOYCE DeWITT, HAROLD EASTMAN, JUNE EASTMAN, GLADYS EDNEY, DOUGLAS GILMOUR, JEROME GRESLEY, GRACE GRESLEY, HAROLD GRIFFIN, MALCOLM GRIMES, ELEANOR GRIMES, HARRIET HINMAN, CHARLES HOLCOMB, MILDRED HOLCOMB, ALAN HUGHES, CATHERINE HUGHES, REGINALD HUNT, MARGARET HUNT, DEXTER JOHNSON, LAURA JOHNSON, JOHN KAYE, LILLIAN KAYE, PAUL KEENAN, PHYLLIS KEENAN, RICHARD KLEINFELDER, MARGO KLEINFELDER, SALLY MITCHELL, LAURENCE MOORE, KATHERINE MOORE, FORREST PARKER, LOTHAR RIBA, FRANCESCA RIBA, SHIRLEY RICE, PHILIP VIELLEUX, HAROLD WHIPPLE AND BEVERLY WHIPPLE

v.

BERNARD BRADSHAW, LESLIE MORRISON AND ROBERT M. WORMER INDIVIDUALLY, AND AS SELECTMEN, AND THE TOWN OF MONROE

PETITION FOR DECLARATORY JUDGEMENT AND BILL IN EQUITY

The Plaintiffs, Adams et. al., complain against the Defendant Selectmen, Bernard Bradshaw, Leslie Morrison and Rob-

ert M. Wormer, in their capacity as Selectmen and individually, and the Town of Monroe, as follows:

1. The Plaintiffs are taxpayers in the Town of Monroe and reside in the Village (hereinafter referred to as "Village") of said Town.

2. There are, in addition to the Plaintiffs, other landowners in the Village who are in the same legal position as the Plaintiffs, and the relief herein sought by the Plaintiffs will also be beneficial to those other landowners.

3. The Defendants, Bernard Bradshaw, Leslie Morrison and Robert M. Wormer, are the Selectmen of the Town of Monroe (hereinafter referred to as "Town").

4. The Defendant Town of Monroe, is a municipal corporation existing in Grafton County, New Hampshire.

5. The within action is brought pursuant to the equity powers of the Court, RSA 491:22, Declaratory Judgment, and the Common Law of New Hampshire, *Green v. Shaw*, 114 NH 239, (1974).

6. The Plaintiffs own land and buildings in the Village presently served by the Town Sewer System (hereinafter referred to as the "Town Sewer"). A substantial number of the lots served by the Town Sewer are less than one-half of an acre. The Town Sewer was built by the Town in 1932 and for 56 years has been the sole provider of sewer services in the Village. The Town Sewer discharges untreated sewage into the Connecticut River by a federal permit, which expired on July 1, 1988. After this date, the discharge of such untreated sewage into the Connecticut River is a violation of federal and state law.

7. Since 1967, the Town has been accumulating money in a capital reserve fund to help pay for the construction of a sewage treatment facility, so as to eliminate the discharge of untreated sewage into the Connecticut River. Presently, there is approxi-

mately $210,000 contained in the Capital Reserve Fund. There have been federally funded studies in 1978 and 1982 to determine the appropriate sewage treatment facility, but no such facility was ever authorized, funded and constructed.

8. In May, 1987, the Defendants, the Selectmen, without Town authority, requested the Water Supply Pollution Control Division (hereinafter referred to as the "WSPCD") to do a subsurface disposal system feasibility study, that is, to terminate the Town Sewer and require the Plaintiffs and others to install individual septic systems. The report was delivered in August of 1987. On September 15, 1987, WSPCD informed the Defendants, the Selectmen, that the Town could not meet the July 1, 1988 deadline to terminate discharging untreated sewage into the Connecticut River by any other means except subsurface, as there was not sufficient time to design and construct a sewage treatment facility. On November 12, 1987, a Special Town Meeting authorized the Selectmen to hire engineers at Town expense to design subsurface disposal systems on private property.

9. On December 24, 1987, WSPCD determined from EPA that Monroe would not be subject to up-front penalties and construction schedules may be extended up to 1992. Therefore, the July 1, 1988 cut-off was movable and there was sufficient time to design and construct a sewage treatment facility.

10. Notwithstanding the favorable change, the Defendants, the Selectmen, have continued to wrongfully and illegally pursue the threatened disconnection of some 45 homes from the Town Sewer as a means of imposing the unreasonable cost and uncertain reliability of individual systems on lots, most of which do not have sufficient minimum size or adequate soil for such systems. Nearly 50% of the individual systems require mounds, some between 5' and 6' in height.

11. The Defendants, the Selectmen, illegally applied for and obtained, without any consent from private property owners, from WSPCD, construction approval for designing subsurface

systems on individual properties that included substantial and extensive modifications and waivers from WSPCD requirements, which will adversely affect the values of the properties and adjoining properties.

12. The Defendants, the Selectmen, have expended $55,000 of Town funds illegally on the design of subsurface disposal systems on private property.

13. The Defendants, the Selectmen, now threaten to cut the Town Sewer connection of any house that has not built an individual system and direct the Town Health Officer to condemn the use of that building in order to illegally coerce the Plaintiffs and other individual property owners in the Village.

14. The Defendants, the Selectmen, have never fully disclosed to voters that there is sufficient opportunity to design, construct and install the sewage treatment facility. The Defendants, the Selectmen, have withheld information about alternatives to individual subsurface disposal systems that would be in the long-range best interest of the Town and the Village, and which would preserve property values and enhance the development and growth of the Village, as well as the Town.

15. The Defendants, the Selectmen, have made arbitrary decisions and pursued an oppressive course of action against the Plaintiffs and other landowners in the Village in relation to the Town Sewer.

16. Under these circumstances, the Plaintiffs have vested property rights in the connection to the Town Sewer.

17. Action taken at the 1988 Town Meeting is illegal as failing to comply with legal requirements. Under Article 18 the subject matter was:

"To see if the Town will vote to authorize the withdrawal of up to $100,000 from the Capital Reserve Fund for acquisition of land to accomplish the purpose of the Capital Reserve Fund."

Action under this Article was as follows:

"A motion was made by Les Morrison to pass this Article as written..." The motion carried/article passed."

This Article and the action taken pursuant thereto is inadequate as a matter of law for the Town to purchase land.

18. Other action taken at the 1988 Town Meeting is also illegal. Under Article 19 the subject matter was as follows:

"To see if the Town will vote to designate the Board of Selectmen as agents to expend the Capital Reserve Fund for the purpose for which said fund was established (Monroe Village Sewer Fund)."

The action taken under Article 19 was as follows:

"Les Morrison moved that we accept this article #19 as written..Motion was accepted by a majority voice vote."

The Defendants claim that authority under Article #19 will authorize them to withdraw money without further town meeting vote so long as the funds are expended for the purpose of the Capital Reserve Fund, namely, for the purpose of designing and constructing a sewer disposal system or systems for the Monroe Village Sewer System that complies with Federal and State Law and Regulations. The authority granted in Article #19 is required by RSA 35:15 as part of a vote by the Town Meeting as required by RSA Chapter 35, appropriating capital reserve funds.

19. The Defendants, the Selectmen, by their action described herein have violated the Plaintiffs' Federal constitutional rights of Equal Protection and Due Process.

20. The Defendants, the Selectmen, under color of state law and local authority, have subjected the Plaintiffs to be deprived of rights, privileges or immunities secured by the Federal

Constitution and Federal Laws and are liable to the Plaintiffs for compensatory damages under 42 USC, Section 1983, and for the award of attorney's fees under 42 USC, Section 1988.

WHEREFORE, the Plaintiffs request that the Court:

A. Declare that the expenditure of Town funds for the design of subsurface disposal systems on private property is a violation of law;

B. Declare that the action taken under Articles 18 and 19 is illegal.

C. Enjoin the Defendants, the Selectmen, from pursuing the illegal plan of disconnecting the Plaintiffs' houses and buildings in the Village from the Town Sewer;

D. Order the Selectmen to disclose all facts relative to the applicable law and regulations relating to the termination of discharge of untreated sewage into the Connecticut River and offer to the voters of the Town the alternatives available for sewage treatment, which would be in the long-range best interest of the Village and the Town;

E. Award compensatory and punitive damages for the Defendant Selectmen's illegal and wrongful acts;

F. Award the Plaintiffs' their attorney's fees under applicable Federal or State law;

G. And for such other and further relief as may be just and equitable.

Dated this 19 day of July, 1988.

Respectfully submitted,

Raymond Adams, Betty Adams, Philip Basch,

Irene Basch, Guy Burrill, Marjorie Burrill, Larkin Burrill, Amy Burrill, Elizabeth Carlisle, David Choate, Stephen Dana, James DeWitt, Joyce DeWitt, Harold Eastman, June Eastman, Gladys Edney, Douglas Gilmour, Jerome Gresley, Grace Gresley, Harold Griffin, Malcolm Grimes, Eleanor Grimes, Harriet Hinman, Charles Holcomb, Mildred Holcomb, Alan Hughes, Catherine Hughes, Reginald Hunt, Margaret Hunt, Dexter Johnson, Laura Johnson, John Kaye, Lillian Kaye, Paul Keenan, Phyllis Keenan, Richard Klienfelder, Margo Klienfelder, Sally Mitchell, Laurence Moore, Katherine Moore, Forrest Parker, Lothar Riba, Francesca Riba, Shirley Rice, Philip Vielleux, Harold Whipple, Beverly Whipple,
Plaintiffs

By:
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P.O. Box 583
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(603) 643-5700

sbb6/88-3 Monroe

APPENDIX B

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, ss. DOCKET NO. 88-E-107

RAYMOND ADAMS, ET. AL.

v.

BERNARD BRADSHAW, ET. AL.

MOTION TO AMEND PLAINTIFFS' PETITION AND REQUEST FOR PROMPT HEARING ON THE MERITS

The Plaintiffs move as follows.

That the pending petition be amended by the addition of the following:

Count II

"1. The Plaintiffs and other persons similarly situated live in the village which is a part of the Town of Monroe.

2. The village consists of an estimated 45 single family homes, Town Hall, library, fire station, school, clinic, bank, church and one store.

3. In 1932 the Town voted to construct and install a sewer in the village, exercising the discretionary power contained presently in RSA 149-I:l which is the same as the law existed in 1932 in P.L. 95:3.

4. Following the construction and installation of the waste treatment collection system in 1932, the Town has appropriated money annually for the maintenance of the sewer system.

The sewer system was extended after 1932 to provide service on the Plains Road.

5. In 1971 the Town voted to establish, at the 1971 Annual Town Meeting, a capital reserve fund for the purpose of a sewer disposal unit. Subsequent to 1971, until and including 1981, the Town appropriated money each year to be paid into the capital reserve fund which accumulated in November of 1987 to approximately $200,000.

6. In 1975 the Town voted to expend money for the purpose of preparing a facilities plan on sewage and sewerage treatment facilities to comply with federal requirements relating to water pollution. Again in 1977, the Town appropriated funds to prepare plans and specifications for sewage treatment facilities. These appropriations in 1975 and 1977 related solely to the village sewer system.

7. Since the construction of the village sewer system in 1932, an estimated 14 additional buildings were added, including the Town Hall and an addition to the School (K-8).

8. There are special conditions which exist in the village area which relate to the compelling necessity for a village sewer system. Most of the soil in the village is type 36A consisting of Adams loamy sand. This particular soil has severe restrictions for septic tank absorption fields. According to the 1976 Cotton Map, which shows aquifers in New Hampshire, a large portion of the village is located on top of an aquifer. There is located in the center of the village on the lot on which the School is located, Tax Map U-2, Lot 23, a community water system which serves the entire village. Thirty percent of the lots in the village contain less than 20,000 square feet.

9. Since the installation of the sewer system in the village in 1932, development has relied on the central sewer system. Money has been collected over the years from taxpayers in the village as well as in the Town to be paid into the capital reserve fund established for paying for a sewage disposal unit. Re-

quests to install an on-site septic system for a new house on a new lot in the village have been denied by the Selectmen and the landowner required to connect to the village sewer system.

10. On February 10, 1989, at a Special Town Meeting, it was voted to abandon the village sewer system and to authorize the Selectmen to issue cease and desist orders to the current users of the system who have until October 15, 1989 to construct and install in some manner, at their expense, on-site septic disposal systems.

11. Since 1932 the Town has held itself out as the supplier of sewer services for the village. For over 50 years property owners in the village have relied on that representation. The Town knew that property owners were relying on that representation. The Plaintiff and other landowners similarly situated were induced to act upon that representation. They contributed tax money to the capital reserve fund. Houses were constructed and remodeled in reliance threon. The school was added to in 1967 and has a present enrollment of 101 children with future growth guaranteed.

Now the Plaintiffs and others similarly situated, face an unknown future; the apparent necessity of on-site sewage disposal systems; many lots with no place for an on-site system; many lots requiring systems expensive to install, uncertainties as to service and useful life; and the devaluation of their properties.

One taxpayer in the Town pays more than one-half of all the taxes. The anticipated cost of a wastewater treatment system is reasonable, will have little impact on the Town's property owners and will not constitute an excessive burden. The users will pay all operation expenses. A grant is available from the State of New Hampshire, together with a loan with a beginning interest rate of one percent (1%).

Count III

1. At a Special Town Meeting on February 10, 1989, the following article was on the Warrant:

"Article 5. To see if the Town will vote to approve, as an alternative to individual subsurface disposal systems as set forth in Article 1, as an alternative to a community subsurface wastewater disposal system as set forth in Article 2, as an alternative to a community sand filter wastewater treatment system as set forth in Article 3, and as an alternative to an aerated lagoon wastewater treatment system as set forth in Article 4, **the construction of individual subsurface disposal systems for Town-owned building (sic), which Town-owned building (sic), which are defined as the Monroe Town Hall, Monroe Clinic, the Monroe Village Fire Station, and the Monroe Public Library, to eliminate the discharge of raw wastewater to the Connecticut River.**" (Emphasis added.)

This Article received approval from the voters.

2. Under RSA 39:2 the subject matter of all business to be acted upon at the Town Meeting is required to be distinctly stated in the Warrant. In order for the Town Meeting to appropriate money, the Warrant article must state as the subject matter to be acted upon under Article 5 that money is to be appropriated.

3. The Defendants seek to use money contained in a capital reserve fund to pay for the expenditures claimed to be authorized under the vote under Article 5 as set forth above. In order to expend money held in a capital reserve fund, there must be an article in the Warrant which distinctly states that such is the purpose, RSA 35:15 and RSA 35:3. In addition, no expenditure can be made for a purpose which is not in conformity with the purposes for which the fund was established. RSA 35:15. Any change in the purpose of a capital reserve fund requires an article which conforms to the requirements of RSA 39:2 and

RSA 35:3. A vote of two-thirds of all voters present and voting is mandated by RSA 35:16 for the change.

4. The Trustee of Trust Funds holding such capital reserve funds cannot make any payment unless authorized to do so in accordance with RSA Chapter 35, otherwise they are subject to the penalties of RSA 35:18.

WHEREFORE, the Plaintiffs request the Court:

A. To promptly schedule a hearing on the merits of the original petition and the amendment contained herein because of the deadline set by the Town of October 15, 1989 for the disconnection of the Plaintiffs and other current users from the village sewer system.

B. That the Court order the Defendants not to expend money for the purposes set forth in Article 5 as voted on February 10, 1989 for the lack of a valid appropriation and valid vote to withdraw funds from the capital reserve fund.

C. That the Court enter an order preventing the abandonment of the village sewer system.

D. That the Court enter an order compelling the Town to construct a wastewater treatment plant in compliance with State and federal requirements and that the cost of the plant be paid by the Town and the users charged for operation and maintenance.

E. That the Court enjoin the illegal use of Town funds for the construction of on-site subsurface disposal systems for Town buildings.

F. That the Court enjoin the Selectmen from illegally issuing cease and desist orders requiring the disconnection of current users from the village sewage system.

G. And for such other and further relief as may be just and equitable.

WHEREFORE, the Plaintiffs move:

A. That the Court allow the amendment by the addition of Count II and III to cover additional claims that have arisen since the filing of the Plaintiffs petition.

B. That the Court schedule a pretrial conference to establish an early date for trial on the merits of the original petition and the amendment contained herein.

DATED this 17 day of March, 1989.

Respectfully submitted
Raymond Adams, et al
By their attorney,

Laurence F. Gardner, Esq.
PO Box 583
Hanover, NH 03755
(603) 643-5700

Certificate

I hereby certify that a copy of the foregoing Motion has been mailed this 17th day of March, 1989, postage prepaid, to Kevin R. Bruno, Esq., PO Box 109, Woodsville, NH 03785, attorney for the Defendants.

Laurence F. Gardner, Esq.

LFG:jw
MAR89/3-3monroe

ARTICLE 1. To see if the Town will vote to appropriate the sum of Nine Hundred Five Thousand Nine Hundred Dollars and No Cents ($905,900.00) for the construction of individual subsurface disposal systems to eliminate the discharge of raw wastewater to the Connecticit River with the Town maintaining legal ownership of said systems until further action of the legislative body of the town and with the landowners on which said systems are located with the exception of Town-owned property, which is defined as the Monroe Town Hall, the Monroe Clinic, the Monroe Village Fire Station and the Monroe Public Library, granting by means of a deed an easement to the Town for ingress and egress to said systems and to acquire a parcel of land consisting of Five (5.0) acres, more or less, of the land presently of Edith Ann Emery, Priscilla Powers and the New England Power Company for the construction of said systems for the Monroe Consolidated School, Joseph Ferris and Priscilla Powers, the legal ownership of which is to remain with the town until further action of the legislative body of the Town, said amount to be raised by the issuance of certain municipal serial notes and/or bonds under and in compliance with the provisions of the Municipal Finance Act and to further authorize the Selectmen to issue and negotiate such notes and/or bonds and to determine the rate of interest thereon and to take such other action as may be necessary to effect the issuance, negotiation, sale and delivery of such notes and/or bonds as shall be in the best interests of the Town.

ARTICLE 2. To see if the Town will vote to appropriate the sum of One Million Three Hundred Thirteen Thousand Nine Hundred Dollars and No Cents ($1,313,900.00) for the construction of a community subsurface wastewater disposal system to eliminate the discharge of raw wastewater to the Connecticut River, as an alternative to individual subsurface disposal systems as set forth in ARTICLE 1, and to acquire a parcel of land consisting of Fifteen (15.0) acres, more or less, of the land presently of Edith Ann Emery, Priscilla Powers and the New England Power Company for the construction of said system, said amount to be raised by the issuance of certain

municipal serial notes and/or bonds under and in compliance with the provisions of the Municipal Finance Act and to further authorize the Selectmen to issue and negotiate such notes and/or bonds and to determine the rate of interest thereon and to take such other action as may be necessary to effect the issuance, negotiation, sale and delivery of such notes and/or bonds as shall be in the best interests of the Town.

ARTICLE 3. To see if the Town will vote to appropriate the sum of Two Million Forty-Five Thousand Dollars and No Cents ($2,045,000.00) for the constrction of a community sand filter wastewater treatment system to eliminate the discharge of raw wastewater to the Connecticut River, as an alternative to individual subsurface disposal systems as set forth in ARTICLE 1 and as an alternative to a community subsurface wastewater disposal system as set forth in ARTICLE 2, and to acquire a parcel of land consisting of Fifteen (15.0) acres, more or less, of the land presently of Edith Ann Emery, Priscilla Powers and the New England Power Company for the construction of said system, said amount to be raised by the issuance of certain municipal serial notes and/or bonds under and in compliance with the provisions of the Municipal Finance Act and to further authorize the Selectmen to issue and negotiate such notes and/or bonds and to determine the rate of interest thereon and to take such other action as may be necessary to effect the issuance, negotiation, sale and delivery of such notes and/or bonds as shall be in the best interests of the Town.

ARTICLE 4. To see if the Town will vote to appropriate the sum of One Million Four Hundred Thirteen Thousand Dollars and No Cents ($1,413,000.00) for the construction of an aerated lagoon wastewater treatment system to eliminate the discharge of raw wastewater to the Connecticut River, as an alternative to individual subsurface disposal systems as set forth in ARTICLE 1, as an alternative to a community subsurface wastewater disposal system as set forth in ARTICLE 2 and as an alternative to a community sand filter wastewater treatment system as set forth in ARTICLE 3, and to acquire a parcel of land consisting of Fifteen (15.0) acres, more or less, of

the land presently of Edith Ann Emery, Priscilla Powers and the New England Power Company for the construction of said system, said amount to be raised by the issuance of certain municipal serial notes and/or bonds under and in compliance with the provisions of the Municipal Finance Act and to further authorize the Selectmen to issue and negotiate such notes and/or bonds and to determine the rate of interest thereon and to take such other action as may be necessary to effect the issuance, negotiation, sale and delivery of such notes and/or bonds as shall be in the best interests of the Town.

ARTICLE 5. To see if the Town will vote to approve, as an alternative to individual subsurface disposal systems as set forth in ARTICLE 1, as an alternative to a community subsurface wastewater disposal system as set forth in ARTICLE 2, as an alternative to a community sand filter wastewater treatment system as set forth in ARTICLE 3 and as an alternative to an aerated lagoon wastewater treatment system as set forth in ARTICLE 4, the construction of individual subsurface disposal systems for Town-owned buildings, which are defined as the Monroe Town Hall, Monroe Clinic, the Monroe Village Fire Station and the Monroe Public Library, to eliminate the discharge of raw wastewater to the Connecticut River.

ARTICLE 6. To see if the Town will vote, as an alternative to individual subsurface disposal systems as set forth in ARTICLE 1, as an alternative to a community subsurface wastewater disposal system as set forth in ARTICLE 2, as an alternative to a community sand filter wastewater treatment system as set forth in ARTICLE 3 and as an alternative to an aerated lagoon wastewater treatment system as set forth in ARTICLE 4, to abandon the system that is currently in operation and which is currently discharging raw wastewaer to the Connecticut River and to authorize the Selectmen to issue cease and desist orders to the current users of said system.

APPENDIX C

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

Raymond Adams, et al

v.

Town of Monroe, et al

88-E-107

ORDER

The plaintiffs, landowners in the town of Monroe, New Hampshire, filed this Petition for Declaratory Judgment and Bill in Equity on July 25, 1988. The defendants are the town of Monroe (the "Town") and the three selectmen ("selectmen"), individually and in their capacity as selectmen. The plaintiffs requested the following relief: that the Court declare that expenditure of town funds for the design of subsurface disposal systems on private property was illegal, that the Court declare illegal certain actions taken pursuant to Articles 18 and 19 of the March, 1988 town meeting, that the Court enjoin the defendants from disconnecting the plaintiffs' houses from the town sewer, that the Court award compensatory and punitive damages under 42 U.S.C. § 1983, and that the Court award attorney's fees under 42 U.S.C. § 1988 and under applicable state law.

In a motion to amend, dated March 17, 1989, the plaintiffs requested the following additional relief: that the Court enjoin the defendants from using town funds to construct individual on-site subsurface disposal systems for town buildings, that the Court order that the town sewer system not be abandoned, that the Court order the Town to construct a wastewater treatment plant, and that the Court enjoin the defendants from issuing

cease and desist orders requiring users to disconnect from the town sewer. In their responses to the plaintiffs' petition and amended petition, the defendants requested that the Court award attorney's fees and costs.

The focus of this lawsuit is the town sewer, constructed and installed in the village area of Monroe in 1932. Since that time, the sewer line has collected wastewater from the approximately 54 buildings, including single-family homes, town buildings, and a few businesses. Some of these buildings were constructed after 1932. The sewer discharges the untreated sewage into the Connecticut River. This discharge occurred pursuant to a federal and state permit which expired on July 1, 1988. After this date, discharge of the untreated sewage is a violation of federal and state law. The Town has maintained the sewer and annually by town vote has appropriated a sum for its maintenance and repair. A summary of the events giving rise to this action will be helpful.

At the annual town meeting in 1971, the Town voted to establish a Capital Reserve Fund for the purpose of eventually constructing a sewer disposal unit. From 1972 until and including 1981, the Town appropriated money each year to be paid into the Capital Reserve Fund which accumulated in November, 1987 to approximately $200,000. In 1983, the Capital Reserve Fund appropriation article was deleted by the defendants and was not reinserted.

In 1978 and in 1982, the Edward G. Jordan Company conducted studies to determine the appropriate sewage treatment facility, but no such facility was ever authorized, funded or constructed. These studies did not recommend on-site systems as an alternative. In May of 1987, the defendants requested the state agency water Supply and Pollution Control Division ("WSPCD") to conduct a subsurface disposal system feasibility study, which was completed and delivered to the Town in August of 1987. This study, for which the Town was not charged, dealt with the feasibility of individual septic systems in lieu of the town sewer.

On September 15, 1987, the WSPCD informed the defendants that the Town could not meet the July 1, 1988 deadline to terminate discharging untreated sewage by any other means than subsurface as there was insufficient time to design and construct a sewage treatment facility. Between October, 1987 and the summer of 1989, issues surrounding the town sewer and the disposal problem were discussed at various informational, special, and annual town meetings.

Subsequent to a vote at a special town meeting in November of 1987, the defendants hired Rist-Frost Associates ("Rist-Frost") to design individual subsurface disposal systems for those properties which were connected to the town sewer. In order to prepare design plans for these systems, Rist-Frost obtained permission from the majority of property owners to go onto their property. Eight property owners refused such permission. Rist-Frost conducted the study over the winter and submitted its proposed designs to the Town. Rist-Frost was also hired in the spring of 1988 to evaluate four sewage treatment options as alternatives to individual on-site systems.

On April 7, 1989, the Town and the state of New Hampshire entered into a Consent Decree as a result of a lawsuit filed by the State against the Town. The state had alleged that Monroe is in violation of RSA 149:8, III (a) by failing to comply with the state permit under which it is discharging and thereby allowing untreated sewage to flow into the River. The Consent Decree provided a schedule for compliance under which the Town was required to close all wastewater discharges to the State's surface waters no later than October 15, 1989. The Town was also required to issue cease and desist orders to all private users of the system by April 15, 1989. Under the Consent Decree, Monroe is subject to substantial penalties for failure to comply with its requirements.

Over the summer and fall of 1989, individual septic systems were constructed for the town buildings. On October 27, 1989, the Town Health Officer sent cease and desist orders to all

property owners whose buildings were still connected to the town sewer. Altogether, approximately 32 properties on the town sewer had on-site septic systems constructed by November 8, 1989. The hearing on this case was held on November 13, 14, 15, and 16 of 1989.

The Court will consider each of the following overall issues: the legality of various expenditures by the defendants, the legality of discontinuing the town sewer, whether the Town is required to construct a wastewater treatment plant, whether the vote discontinuing the town sewer constitutes a taking by inverse condemnation, and whether either the plaintiffs or the defendants are entitled to an award of attorney's fees.

LEGALITY OF EXPENDITURES BY DEFENDANT SELECTMEN

The plaintiffs argue that the defendants expended money from the Sewer Capital Reserve Fund ("fund") without proper authorization by vote to appropriate the funds. The defendants claim that the expenditure was legal pursuant to RSA 35:15 and the votes taken at several town meetings.

In the law of municipal corporations, an appropriation is "the setting apart of a designated sum for a particular purpose or purposes." 15 E. McQuillen, *The Law of Municipal Corporations*, §39.60 at 211 (3d ed. 1985). The plaintiffs are correct when they assert that it is only the town, through a valid town meeting vote, that can appropriate money. RSA 31:4. The legislature in New Hampshire, however, has provided a mechanism by which towns may set up a fund for a particular purpose which is distinct from the general fund of a town.

Chapter 35 of the Revised Statutes Annotated authorizes the establishment of a capital reserve fund, RSA 35:1, and specifies the procedures for raising and appropriating money for the fund, RSA 35:5. The fund is held in the custody of a trustee, RSA 35:10, until such time as the town by majority vote at an annual town meeting names agents to "carry out the

objects designated by the town," RSA 35:15. Expenditures from the fund shall be made only in connection with the purposes for which the fund was established. RSA 35:15. RSA 35:16 provides that any change of purpose of a capital reserve fund requires "a vote of 2/3 of all voters present and voting at an annual town ... meeting."

As noted above, the Town established a capital reserve fund in 1971 for the purpose of constructing a sewer disposal unit. From 1972 through 1981, the town voted at annual town meetings to appropriate money into this fund. At the annual town meeting in March of 1988, the Town voted, by the requisite two-thirds majority, to "change the purpose of the existing sewer disposal unit capital reserve fund to one with the purpose of designing and constructing a sewage disposal system, or systems for the Monroe Village Sewer System that complies with federal and state law and regulations." Defendants' Exhibits C and D. At this meeting, the Town also voted under article 19 to designate the Selectmen as "agents to expend the Capital Reserve Fund for the purpose for which said fund was established. (Monroe Village Sewer Fund)." Id.

In this case, the plaintiffs have not asserted that the initial raising of money and its appropriation into the sewer Capital Reserve Fund was improper. Rather, the gist of their argument is that the expenditure of its funds by the defendants was illegal. The Court turns now to the specific expenditures at issue.

In the summer of 1989, the defendants expended money from the fund for the construction of individual subsurface septic systems for the town buildings. They did this subsequent to a vote at a special town meeting in January of 1989. The Court finds that this expenditure was legal and proper.

The defendant selectmen had been named agents for the fund and, as such, were authorized to expend money from the fund for the amended purpose of the fund. Having ascertained the wishes of the majority of voters, they expended money

following the procedures mandated by Chapter 35. The installation of septic systems for town buildings is clearly a capital improvement, and was for a public, as opposed to a private, purpose. See *Leavitt v. North Hampton*, 98 N.H. 193 (1953). Likewise, the Court finds that the expenditure was one in connection with the amended purpose of the fund.

The cases cited by the plaintiffs, *Gove v. Lovering*, 3 N.H. 292 (1825) and *State v. Hayes*, 61 N.H. 264 (1881), are distinguishable from the case at bar. Both *Gove* and *Hayes* involved excessive discretion by selectmen in the raising and appropriation of money for the general fund of the Town. The case here, by contrast, involves expenditure of money by the selectmen from a limited fund which was established, and for which money was appropriated by the voters, pursuant to the procedures prescribed by Chapter 35.

In the late fall of 1987, the defendants hired Rist-Frost Associates to design individual septic systems for those properties which were connected to the town sewer. This was done subsequent to a vote, at a special town meeting in November of 1987, authorizing the defendants to do so. Although this expenditure preceded the votes taken at the March, 1988 annual town meeting naming the selectmen as agents for the fund and changing the purpose of the fund, the Court finds that this expenditure was legal pursuant to Chapter 35.

Article 2 of the warrant for the meeting authorized the selectmen to use money from the fund to hire professionals to design the systems. Defendants' Exhibits A and B. The Court finds, therefore, that the necessary agency powers were present. Although the selectmen's actions in hiring Rist-Frost to design individual septic systems ran counter to the stated purpose of the fund at that time, the vote in March of 1988, legally changing the purpose of the fund, was sufficient to render the defendants' action legal. Although the design plans included systems for private property, given the water pollution situation and the importance of a workable town sewage system, the Court finds that the expenditure was for a public purpose.

Finally, the design of individual systems for all properties connected to the town sewer was a capital improvement. *Leavitt v. North Hampton*, 98 N.H. 193 (1953).

Another expenditure questioned by the plaintiffs was for the hiring of Rist-Frost Associates in the Spring of 1988 to evaluate sewage treatment options. This money was not expended pursuant to a town vote but, rather, was expended after the defendants had held an informational meeting and listened to the concerns expressed by various property owners, including some of the plaintiffs in this case. The Court finds that this expenditure was legal.

The selectmen were designated agents of the fund, and the evaluation of sewage treatment options satisfied the amended purpose of the fund. Likewise, it was a capital improvement and was for a public purpose. The Court finds that the informational meeting and its outcome provided the necessary level of input from the voters of Monroe to allow the agents of the fund "to carry out the objects designated by the town." RSA 35:15.

Finally, the court finds that the vote at the annual town meeting in March of 1988 to authorize the withdrawal of $100,000 from the fund for acquisition of land to accomplish the purpose of the fund was legal pursuant to RSA 35:15 as was any action the defendants took pursuant to that vote.

In summary, the Court finds that the expenditures by the defendant selectmen from the Capital Reserve Fund were legal and proper.

LEGALITY OF DISCONTINUING THE TOWN SEWER

On January 10, 1989, a special town meeting was held at which the Town voted to abandon the town sewer. The plaintiffs have requested that the Court enjoin the defendants from disconnecting the plaintiffs' houses from the town sewer and from discontinuing the town sewer system. They also request

that the Court order the defendants to construct a wastewater treatment plant.

The plaintiffs argue first that state law, RSA 149-I:1, does not authorize the town to abandon the town sewer. RSA 149-I:1, however, authorizes a town to construct and maintain sewers if it so decides. It does not prohibit a town from discontinuing a sewer system once it has been constructed. The plaintiffs' reliance on *Mitchel v. Dover*, 98 N.H. 285 (1953) is misplaced. *Mitchel* stands for the proposition that a town may be liable for damages caused by the property it owns, and not that once constructed a town may not discontinue a sewer. Id. The court therefore finds that there was no statutory violation in the town vote to abandon the sewer.

The plaintiffs also argue that regardless of whether there was statutory authority to abandon the sewer, to do so would violate the New Hampshire Constitution. The vote to abandon the town sewer was an exercise of police power akin to that exercised by towns in zoning ordinances. Where such an exercise infringes on property rights, a test is utilized in which the action "must be reasonable, not arbitrary, "and must bear a "substantial relationship to the purported goal." *Town of Chesterfield v. Brooks*, 126 N.H. 64, 69 (1985) (citations omitted). Assuming for the moment that the plaintiffs' property rights have indeed been affected by the vote, the Court finds nevertheless that the injunctions requested by the plaintiffs are not warranted.

The public benefit in this case outweighs the private harm at least insofar as the request for injunctions is concerned. The plaintiffs ask this Court to order that the Town continue to operate the town sewer and to construct a sewage disposal plant contrary to the wishes of the majority in the Town as evidenced by the vote. Unlike the New Hampshire cases cited by the plaintiffs in which actions taken pursuant to the police power have been held constitutionally infirm, the non-plaintiff residents of the Town of Monroe would be directly affected by such an injunction. In the zoning cases, an ordinance may be

held invalid as applied to a particular plaintiff and the result will not impact disproportionately on the rest of the Town. Under the facts of the case at bar, to grant the relief requested by the plaintiffs would in effect force the Town to continue indefinitely a service it no longer wishes to provide.

The vote to abandon the sewer was reasonable given the illegal discharge into the Connecticut River and the penalties and fines faced by the Town for the delay in alleviating the problem. Choosing the method that is the quickest to implement, thereby solving the problem, is not an arbitrary action. Finally, the method, abandoning the town sewer and requiring property owners to install individual systems, bears a substantial relationship to the stated goal of eliminating the source of pollution.

The Court also finds that to order the defendants not to disconnect plaintiffs from the sewer and to order the Town to construct a sewage disposal plant would not be equitable in light of all of the circumstances of this case. *See Manchester Dairy System, Inc. v. Hayward*, 82 N.H. 193, 207 (1926). In determining whether to grant or deny an injunction, the Court will consider all of the circumstances in a particular case, *see Unifirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987), as well as the public interest. *Bowers v. Calkins*, 84 F. Supp. 272, 278 (D.N.H. 1949). An injunction will generally issue if: 1) there is an immediate danger of irreparable harm to the party seeking injunctive relief and 2) this party has no adequate remedy at law. *Unifirst Corp. v. City of Nashua*, 130 N.H. at 14. Hardship upon the defendant may, however, be a sufficient ground for withholding injunctive relief, which is an extraordinary remedy of equity. *Carroll v. Schechter*, 112 N.H. 216, 221 (1972). Although the plaintiffs have arguably established the requisite elements for injunctive relief, issuance of the injunctions requested by the plaintiffs would impose a severe hardship upon the Town. Continued operation of the sewer system would subject the Town to prosecution under state and federal environmental laws in addition to penalties and fines. Moreover, continued discharge of raw sewage into the Connecticut River

is clearly contrary to the public interest. The Court therefore denies the plaintiffs' requests for injunctions. Consistent with this, the Court also declines to permanently enjoin the defendants from issuing cease and desist orders requiring users to disconnect from the town sewer. Further, the Court finds no violation of the equal protection or due process clauses of the fourteenth amendment of the Federal Constitution.

WHETHER THE VOTE ABANDONING THE TOWN SYSTEM CONSTITUTES A TAKING BY INVERSE CONDEMNATION

Although the Court finds that there is a public benefit to the Town of Monroe from the vote to abandon the town sewer, the vote nevertheless constitutes a taking by inverse condemnation. *See Loundsbury v. City of Keene*, 122 N.H. 1006 (1982). The New Hampshire Constitution requires that there be just compensation when the government, through the use of the police power, "takes" private property. N.H. Const. pt. 1, art. 12 ("no part of a man's property shall be taken from him ... without his consent"); *Burrows v. City of Keene*, 121 N.H. 590, 596-97 (1981). This provision, along with Article 2 of Part 1 of the New Hampshire Constitution, is a restriction on the police power of a governmental entity. *Burrows*, *supra* at 596. This restriction applies even when the taking does not amount to a physical invasion of the land, but is, rather, a governmental regulation restricting the exercise of property rights. Id. at 597.

In *Eaton v. B. C. & M. R. R.*, the New Hampshire Supreme Court determined that for purposes of these provisions of the constitution, "property" means "the rights of the owner in relation to it." *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 511 (1872) (citation omitted). "Property" refers to "the right of any person to possess, use, enjoy and dispose of a thing and is not limited to the thing itself. It follows that any unreasonable interference with any one of these rights constitutes a taking even though physical possession remains in the owner. *Metzger v. Town of Brentwood*, 117 N.H. 497, 502 (1977).

In zoning cases, it has been held that "a past use of land may create vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a nonconforming use." *Loundsbury, supra* at 1009. Even where a valid public purpose exists thereby rendering the ordinance reasonable, the application of a zoning provision which is not directed at a harmful activity and which substantially deprives an owner of the use of his land constitutes a 'taking' requiring the payment of just compensation. *Id.* at 1010. The Court finds that this holding applies to the case at bar.

In this case, the town action is directed at a harmful activity: the discharge of sewage into the Connecticut River. However, an essential purpose underlying the requirement of just compensation is that where the public benefits from a taking, the public should pay for it. The Town benefits by the vote to abandon the sewer both in the alleviation of the pollution into the Connecticut River and by not having the continuing responsibility for a sewage disposal plant.

The properties connected to the town sewer have all been used for residential or business purposes for many years. The owners of the property have a vested right to a similar use of their property in the future. Given the laws and regulations regarding disposal of waste which have been enacted since the construction of the sewer system in 1932, the town action abandoning the sewer system more than substantially deprives the property owners of the use and enjoyment of their property. Given that there are alternative solutions to the town's disposal problem which do not require that the sewer be abandoned, choosing as it did the one solution which disproportionately impacts those connected to the town sewer constitutes a taking by inverse condemnation.

There are properties which the evidence proved would not be able to sustain an on-site individual septic system. The Court finds that the following properties cannot sustain an on-site system: Carlisle, Hughes, and McDonnell. Although there was evidence that the Adams and Ryan property may not be able to

sustain an on-site system, because there was no formal evaluation the Court makes no findings with regard to these properties. The Court makes no findings as to whether any other properties are able or unable to sustain an on-site individual septic system. The Court finds that for those properties which cannot sustain an on-site system, there has been a complete taking by inverse condemnation. The vote effectively prevents them from using the property in the manner to which it has been put in the past. The damages would be measured by the difference in value of the property before the vote and after the vote, at which time the properties effectively became worthless for residential purposes. The Court turns now to a consideration of those properties which are currently connected to the sewer but which can sustain an on-site individual septic system.

These property owners would not be completely denied the use of their property for residential purposes. However, given the necessity of expending money to conform their property to legally and properly dispose of waste, the Court finds that the value of the property has been substantially diminished. *See State v. Shanahan*, 118 N.H. 525 (1978). Other factors which support this finding and which may be used in a determination of damages are: the costs, and effect on the value of the property, of maintaining an on-site system as opposed to being connected to a municipal system; and the effect, if any, of lowered aesthetics on the value of the property.

In summary, the Court finds that the town vote to abandon the sewer constitutes a regulatory taking by inverse condemnation. Those property owners affected by this finding may bring an action to determine damages.

ATTORNEY'S FEES

In New Hampshire, the general rule regarding attorney's fees is that parties pay their own fees. *Funtown v. Town of Conway*, 127 N.H. 312, 315 (1985). An exception to this rule is recognized "'where an individual is forced to seek judicial

assistance to secure a clearly defined right' if bad faith can be established." Id. (quoting Harkeem v. Adams, 117 N.H. 687, 619 (1977)). The Court finds that although the actions by both plaintiffs and defendants were often misguided, they do not amount to bad faith requiring payment of attorney's fees.

The plaintiffs refer to the transactions of the defendant selectmen with those property owners whose properties cannot sustain an on-site system. The plaintiffs are correct that although the defendants knew that certain properties could not sustain systems on-site, they did not inform the voters at the special town meeting on February 10, 1989. There was no evidence, however, as to whether any of the voters were or were not aware of this already. The Rist-Frost design plans, clearly noting which properties could not sustain their own systems, had been available for property owner perusal, but, again, it is not clear whether all voters had access to the designs.

Even if the voters had not known that certain properties could not sustain a system, the Court finds that the defendants' actions did not constitute bad faith given their sincere efforts to attempt to accommodate those properties which could not sustain a system. The Court finds generally that the testimony of the defendant selectmen was credible and that the defendants acted in good faith and were sincere in their efforts to solve the problem for individual property owners while also attempting to accommodate the voters as well as state and federal officials.

The Court likewise finds no bad faith by the plaintiffs such that attorney's fees are justified. The claims argued by the plaintiffs and their actions in pursuing them were not unreasonable. The Court therefore denies attorney's fees for both the plaintiffs and the defendants.

The plaintiffs' claims under 42 U.S.C. § 1983 are dismissed. First, the plaintiffs have not claimed a violation of their fifth amendment rights under the Federal Constitution. Second, even if they had so claimed, the plaintiffs have an adequate

remedy under state law for the taking of their property by inverse condemnation. *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir. 1984); *Carroll v. City of Pratville*, 653 F. Supp. 933, 942-43 (M.D. Ala. 1987).

The defendants are ordered not to disconnect the plaintiffs from the town sewer pending any appeal of this order or suit for damages.

The Court makes the following rulings on plaintiffs' Request for Findings of Fact dated November 20, 1989:

GRANTED: 1, 2, 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 37, 38, 39, 40, 42, 43, 45, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 80, 81.

DENIED: 17, 22, 31, 36, 47, 51, 52, 60, 79, 82, 83, 84.

No. 6 is granted, but the Court adds that two of the twelve additional buildings were garages and of the ten homes, two were demolished subsequent to their connection to the village sewer.

No. 10 is granted as to the first sentence, denied as to the balance.

No. 41 is granted, but only to the extent that the conclusion of the Rist-Frost report may be affected if the Rist-Frost designs of individual on-site systems are not used.

No. 44 is granted to the extent that the witness stated it, but denied that that is actual fact.

No. 46 is granted but the court notes that "potential" does not rise to the level of "probable."

No. 78 The Court finds that Mr. Bradshaw did not inform

Paul McDonnell that the property he was considering purchasing depended on a leach field located on adjoining property.

The Court makes the following rulings on plaintiffs'

Requests for Rulings of Law dated November 20, 1989:

GRANTED: 2, 8, 9, 11.

DENIED: 1, 3, 4, 5, 6, 7, 10, 12, 14, lS, 16, 17, 18.

No. 13 The Court finds that the New Hampshire Constitution, part I, articles 2 and 12 were violated in that the vote abandoning the town sewer constituted a taking by inverse condemnation without just compensation.

The Court makes the following rulings on plaintiffs'

Additional [Requests for] Findings of Fact as-to plaintiffs'

Exhibit 35 dated November 27, 1989:

GRANTED: 51A, 51B, 51C, 51E.

DENIED: 51D, 51F.

The Court makes the following rulings on defendants'

Requests for Findings of Fact dated September 13, 1989:

GRANTED: 1, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 37, 38, 39, 40, 42, 43, 44, 45, 46, 48, 49, 50, 51, 60, 61, 62.

DENIED: 34, 41, 56, 58, 59.

Nos. 2-6 are neither granted nor denied.

No. 17 is granted, but only to the extent that the Court

recognizes that the property owners refused permission to Rist-Frost to enter their property to test, as is reflected in the appendix to Plaintiffs' Exhibit 6.

No. 18 is neither granted nor denied.

No. 20 is neither granted nor denied.

No . 33 is granted as a general matter, but the Court finds that discontinuance of the town sewer in the case at bar resulted in a taking by inverse condemnation.

Nos . 35 and 36 are granted as a general matter, but denied in this case.

No. 47 is denied, but the Court notes that the word "threatened" is inappropriate.

Nos. 52-55 are granted, but the Court notes that the assertions are immaterial.

No. 57 is granted, but the Court notes that the assertion is immaterial.

The Court makes the following rulings on defendants'

Requests for Rulings of Law dated September 13, 1989:

GRANTED: 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 29, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44.

No . 4 is granted as a general matter, but denied in this case.

No. 10 is denied as worded.

No . 26 is granted as a general matter, but the Court finds that the discontinuance of the town sewer in the case at bar constitutes a taking by inverse condemnation.

No. 27 is granted to the extent that the case cited by the defendants holds this.

No. 28 is granted; however, in the case at bar, the vote to abandon the town sewer entails a taking of property rights by inverse condemnation.

Nos. 30-34 are granted as a general matter, but denied as to the case at bar.

Nos. 45 and 46 are granted as a general matter but denied as to the case at bar.

The Court makes the following rulings on defendants' additional Requests for Findings of Fact dated November 8, 1989:

GRANTED: 1, 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, 14, 16, 17, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32

DENIED: 11, 15, 18.

No. 5 is granted, but this is the basis upon which the unconstitutional taking occurred.

Nos. 24 and 25 are neither granted nor denied.

The Court makes the following rulings of defendants' additional Requests for Rulings of Law dated November 30, 1989:

GRANTED: 1, 2, 3, 4.

DENIED. 5.

Date: (3/13/90)

(signed: Peter W. Smith)
Presiding Justice

APPENDIX D

THE SUPREME COURT OF NEW HAMPSHIRE

Grafton
No. 90-298

RAYMOND ADAMS & a.

v.

BERNARD BRADSHAW & a.
November 7, 1991

Law Office of Laurence F. Gardner, of Lebanon (Laurence F. Gardner on the brief and orally), for the plaintiffs.

Law Office of Edward M. Van Dorn, Jr., of Woodsville (Edward M. Van Dorn on the defendants' joint brief and orally), for the defendants, Bernard Bradshaw, Leslie Morrison, Robert Wormer, and the Town of Monroe.

Law Office of Kevin R. Bruno, of Woodsville (Kevin R. Bruno on the defendants' joint brief), for the defendants, Bernard Bradshaw, Leslie Morrison, Robert Wormer, and the Town of Monroe.

John P. Arnold, attorney general (Leslie J. Ludtke, assistant attorney general, on the brief), by brief for the State, as amicus curiae.

New Hampshire Municipal Association, of Concord (H. Bernard Waugh, Jr., on the brief), by brief as amicus curiae.

THAYER, J. The defendants, the Town of Monroe (the Town) and its selectmen, appeal the Superior Court's (Smith, J.) determination that the Town's discontinuance of its sewer system constitutes inverse condemnation, requiring just compensation, and claim that the trial court erred in denying

attorney's fees and in making certain factual findings. The plaintiffs, several property owners serviced by the sewer system, also appeal the court's decision, arguing that it erroneously allows the defendants to choose discontinuance of the sewer system over construction of a wastewater treatment plant. Moreover, the plaintiffs maintain that the trial court erred in ruling that the selectmen possessed sufficient authority to expend part of the Town capital reserve fund for the construction of septic systems to service Town-owned buildings. We reverse the trial court's finding of inverse condemnation, but affirm its denial of attorney's fees, as well as those decisions appealed by the plaintiffs.

Most of the relevant facts of this case are not in dispute. The Town built a sewer system in 1932 to service properties in its village area. In its present state, this system collects raw sewage from approximately fifty properties and spews it, untreated, into the Connecticut River. In 1971, the Town voted to establish a capital reserve fund for the purpose of constructing a sewage disposal unit, and voted several times thereafter to transfer tax revenue into this fund. Twice the Town hired engineers to study the feasibility of various sewage disposal options, but made no move to build a disposal unit. These engineers did not discuss construction of individual septic systems on the affected properties as an alternative to a type of wastewater treatment facility.

Meanwhile, the Town learned that its State and federal permits to pollute the Connecticut River would expire on July 1, 1988, and would not be renewed. In May 1987, the Town asked the State Water Supply and Pollution Control Division (the WSPCD) to determine the feasibility of individual septic systems in lieu of the Town's sewer. The WSPCD completed its study in August 1987, and informed the Town in mid-September that a wastewater treatment facility for the sewer could not be designed and constructed in time to meet the State and federal July 1, 1988, deadline.

Thus, the defendants turned to subsurface disposal options. At a special town meeting in November 1987, the Town voted to hire engineers "to design individual on-site subsurface disposal systems for the present users of the Monroe Town Sewer System," and to pay for their services out of the Town's capital reserve fund, which at that time totalled approximately $200,000. The engineers completed their study, and in March 1988, the Town passed the following articles:

> "17. To see if the Town will vote to change the purpose of the existing Sewer Disposal Unit Capital Reserve Fund to one with the purpose of designing and constructing a sewage disposal system or systems for the Monroe Village Sewer System that complies with Federal and State Law and Regulations.
>
> 19. To see if the Town will vote to designate the Board of Selectmen as agents to expend the Capital [sic] Reserve Fund for the purpose for which said fund was established."

The July 1, 1988, deadline arrived, but the Town continued to operate its sewer in violation of State and federal law. As a result, the State sued the Town. The plaintiffs also sued the Town, and the selectmen individually. In their petition for declaratory judgment and bill in equity, the plaintiffs claimed a vested property right in the Town sewer and declared illegal the Town's plans to discontinue the sewer. Among other things, the plaintiffs requested that the superior court order the selectmen to "offer to the voters of the Town the alternatives available for sewage treatment, which would be in the long-range best interest of the Village and the Town."

In February 1989, before the trial court took any action on the petition, the Town held a special meeting to determine the fate of the Town sewer, and to decide what, if anything, it should do to help the village property owners dispose of their sewage. A majority of the Town citizens voted to completely abandon the Town sewer and leave the village property owners to their own

devices. The townspeople also passed Article 5, allowing the Town to construct individual subsurface disposal systems for Town-owned buildings located in the village area. The plaintiffs moved to amend their petition soon afterward to challenge the actions taken at the February town meeting and requested the trial court to:

> "order the Defendants not to expend money for the purposes set forth in Article 5 as voted on February 10, 1989 for the lack of a valid appropriation and valid vote to withdraw funds from the capital reserve fund...;]
>
> enter an order preventing the abandonment of the village sewer system...[; and]
>
> enter an order compelling the Town to construct a wastewater treatment plant in compliance with State and federal requirements and that the cost of the plant be paid by the Town and the users charged for operation and maintenance."

In April 1989, the Town and the State entered into a consent decree in the State's lawsuit against the Town. The decree gave the Town a new deadline of October 15, 1989, for ending its discharge of raw sewage into tne river. Several property owners in the village area constructed septic systems during the ensuing months and ceased utilization of the Town sewer. But by the time of the superior court's order in this case, the sewer was still in operation, and was still pumping untreated sewage into the river.

The superior court, by order dated March 13, 1990, ruled that both the expenditure of money from the capital reserve fund and the vote to discontinue the Town sewer were legal. In addition, the court ruled that neither party was guilty of bad faith and that, therefore, neither was entitled to attorney's fees. The court went on, however, to rule that discontinuance of the sewer constitutes inverse condemnation, requiring just com-

pensation by the Town, and enjoined discontinuance of the sewer pending any appeal or suit by the individual property owners for just compensation. Pursuant to its ruling of inverse condemnation, the court found that three properties located in the village area are incapable of sustaining on-site septic systems. Both parties appealed.

Before this court, the defendants argue that the plaintiffs have no vested property right in the sewer system, and that the trial court, therefore, erred in ruling that discontinuance of the sewer constitutes inverse condemnation. In addition, the defendants maintain that the superior court erred in denying them an award of attorney's fees, because the plaintiffs' suit against the selectmen as individuals acting in bad faith had no reasonable basis in fact. The defendants' other arguments on appeal are made moot by our decision in their favor on the first issue and are not addressed.

The plaintiffs, in turn, allege three trial court errors. First, the plaintiffs argue that the Town had no authority to stop providing them with a sewer service. Second, they argue that the Town's decision to discontinue the Town sewer, rather than construct a wastewater treatment facility, was arbitrary and unreasonable, in violation of part I, article 12 of the New Hampshire Constitution. Third, the plaintiffs claim that the selectmen's withdrawal of money from the capital reserve fund to construct on-site septic systems for Town buildings violated RSA chapter 35. We dismiss all three arguments.

We first address the plaintiffs' argument that the Town had no authority to discontinue its sewer service to the residents of the village area. The plaintiffs state in their brief that "[t]here is nothing in RSA Chapter 149-I which indicates directly or indirectly that a city or town would abandon a sewer system that had previously been installed," and that, therefore, "[o]nce a town has chosen to provide a town sewer system, the town cannot withdraw that essential service because of water pollution but, rather, . . . must take the necessary steps to abate the water pollution."

We disagree. RSA 149-I:l grants municipalities the authority to "construct and maintain" sewers and declares that a sewer constructed by a municipality "shall be the property of the [municipality]." Thus, "[a] sewerage system constructed by a municipal corporation is its property and its right to regulate and control the use of it is a necessary incident of its ownership." *Mitchel v. Dover*, 98 N.H. 285, 289, 99 A.2d 409, 412 (1953).

Concomitant with the right to regulate and control one's property is the right to dispose of it as one sees fit, and no statutory language is needed to support this self-evident principle. "Courts generally reqard public sewers and drains as the property of the municipal corporations in which they are bŭilt, and they may be protected and controlled as any other property of the municipality, and no private person has the right to interfere with them." E. McQuillin, *The Law of Municipal Corporations* § 31.29, at 259 (3d ed. 1991). Under most circumstances, a municipality may discontinue its sewer, leaving those previously served by it to dispose of their sewage by other means.

> "As a rule, the right given to a property owner to connect with a municipal sewer is in the nature of a license only, and . . . [s]uch a license may be revoked for cause at any time. The municipality has a right, therefore, if the sewer with which the connection is made becomes a nuisance, to require such drain to be disconnected from the sewer..."

Id. § 31.31, at 289.

The defendants had ample cause to revoke the plaintiffs' license to use the Town sewer; it became a nuisance, as evidenced by the State's suit against the Town for polluting the Connecticut River without a permit. Although the trial court found that three affected properties are incapable of supporting on-site septic systems (a finding which the defendants contest), the defendants aver that the Town will work creatively with these property owners to ensure that no one is forced to vacate

his or her property solely because of a sewer shutdown. The defendants' apparent willingness to accommodate the village property owners as much as possible in their search for new means to dispose of their sewage, where such accommodation was not necessarily required, strengthens our conclusion that the defendants had cause to discontinue the Town sewer.

The plaintiffs' second argument is that the Town's decision to choose discontinuance of the sewer over construction of a wastewater treatment facility violates part I, article 12 of the New Hampshire Constitution. This argument actually consists of two assertions. First, the Town should have voted to construct a wastewater treatment facility, particularly since public utilities own three-fourths of the real estate in the town and would therefore bear the brunt of the construction bill. We cannot, however, second-guess a Town's decision to spare its taxpayers the cost of a treatment facility, regardless of the taxpayers' identity. "A municipality's decision not to make major capital improvements to an existing drainage system is immune as a discretionary decision." *E. McQuillin* § 31.17, at 230. Moreover, we have previously held that a Town's "failure to take discretionary affirmative action" does not constitute a taking for purposes of part I, article 12 of our constitution. *Rockhouse Mt. Property Owners Assoc. v. Town of Conway*, 127 N.H. 593, 601, 503 A.2d 1385, 1390 (1986).

The second part of the plaintiffs' argument is that the Town's decision to discontinue the sewer constituted a taking without just compensation, in violation of part I, article 12; in other words, inverse condemnation. The trial court agreed with the plaintiffs on this issue and the defendants appeal that ruling, arguing that the plaintiffs have no vested property right in the Town sewer. This is a case of first impression for us, and we find learned treatises and decisions of our sister jurisdictions helpful on the issue.

Eugene McQuillin's treatise is a respected authority on the subject of municipal corporations. He states that "the right given to a property owner to connect with a municipal sewer .

. . does not become a vested right merely because the user was put to considerable expense in constructing a drain from the premises and connecting it with the sewer." *E. McOuillin* § 31.31, at 289. A municipality may, he asserts, disconnect a property owner's drain from a sewer for cause "without being liable to the owner of the drain in damages." *Id.*

This view apparently has been accepted by all states confronted with the issue. Vermont, for example, decided the question in 1894, in the case of *Camp v. Village of Barre*, 66 Vt. 563, 29 A. 1022 (1894). Camp's sewage drained into the municipality's open sewer, which had become a nuisance. Camp was ordered to disconnect his drain from the sewer.

> "The plaintiff's contention is that by the arrangement made in 1887 and his payment towards the construction of his drain and receiver he had acquired a property right in the street and a right to the use of his drain and receiver. . . . The arrangement . . . conveyed to [Camp] no property rights. It was at most a license to connect with the sewer then in use. . . . It would be anomalous to hold that the bailiffs, by permitting the plaintiff to connect his drain with one sewer, should thereby preclude themselves from disconnecting it when its use became a nuisance. The defendant could not thus limit its power and defeat one of the purposes for which it was chartered."

Id. at 568-69, 29 A. at 1023-24. The Supreme Court of Wisconsin has similarly stated:

> "Any license to connect with a municipal sewer system must at all times be contingent upon the ability of the system to dispose of the sewage. . . . No one has any vested rights in the use of the sewers, nor can a municipality grant such a vested right. If, for any reason, the system will not handle sewage from a particular source by reason of its nature or quantity, it is within the power of the municipality to require

> that the sewer connection be discontinued, and it may be the duty of the municipality to do so in order to protect itself from possible liability for the creation of a nuisance."

Village of Menomonee Falls v. Michelson, 104 Wis. 2d 137, 143, 311 N.W.2d 658, 661-62 (1981); *see also LaSalle Nat. Bank & Trust Co. v. City of Chicago*, 128 Ill. App. 3d 656, 665-66, 470 N.E.2d 1239, 1245-46 (1984) ("As a general rule, a permit to connect to municipal sewers is in the nature of a license only; it does not create a vested right to such connection;" court found irrelevant to plaintiff's claim that much time had passed and much money had been spent on sewer connection); *Baker v. Princeton*, 226 Ky. 409, 411, 11 S.W.2d 94, 95 (1928) ("The mere right to tap a sewer system in consideration of a specified fee is simply a temporary privilege which must yield when it becomes necessary to discontinue the old system, and construct a new system in order to promote the public health."); *Blue Fox Bar, Inc. v. City of Yankton*, 424 N.W.2d 915, 919 (S.D. 1988) ("This court has stated that no one has any vested rights in the use of sewers nor can the city grant such a vested right.").

In view of this weight of authority and sound reasoning, we also hold that a property owner has no vested right in a sewer connection. The plaintiffs' attempt to distinguish the above-cited cases because each involved one sewer line and not an entire municipal sewer system requires little comment. A property owner does not gain a vested right in a sewer system simply because the neighbors are similarly situated. In the absence of a property right, no taking for purposes of part I, article 12 of the State Constitution has occurred, *see LaSalle Nat. Bank & Trust v. City of Chicago*, *supra* at 664-65, 470 N.E.2d at 1245, and we therefore reverse the trial court's finding of inverse condemnation.

We next address the plaintiffs' third argument on appeal, that the selectmen lacked authority to expend money from the capital reserve fund to construct septic systems for Town-owned buildings. As related above, the Town voted to construct

these septic systems, but never voted on a specific appropriation to pay for the construction. Instead, the Town voted to name the selectmen "as agents to expend the capital reserve fund for the purpose for which said fund was established." The stated purpose is "designing and constructing a sewage disposal system, or systems for the Monroe village sewer system that complies with federal and State law and regulations." The plaintiffs argue, first, that the expenditure for Town-owned buildings does not fall within the purpose of the capital reserve fund and, second, that the selectmen could not lawfully spend the funds without a specific appropriation voted at a town meeting.

We hold that the expenditure falls well within the purpose of the capital reserve fund because designing and constructing septic systems for Town-owned buildings (located within the village area) constitutes "designing and constructing a sewage disposal system . . . for the Monroe village sewer system." The plaintiffs make no argument to support their bald assertion that the expenditure does not fit the intended purpose, and we are unable to conjure one. We note that the selectmen did not expend the capital reserve funds to construct septic systems for Town-owned buildings until after a majority of the townspeople voted to construct such septic systems.

We also hold that the selectmen possess sufficient authority to spend money from the capital reserve fund by virtue of both their designation as agents to spend the money and the provisions of RSA 35:15. This statute states:

> "Persons holding said capital reserve funds in trust, as provided in this chapter, shall hold the same until such time as the town . . . in the manner prescribed by RSA 35:3, shall have named trustees or agents of the town . . . to carry out the objects designated by the town . . . provided that expenditures from any fund established for the acquisition of land pursuant to RSA 35:1 shall be made only as authorized by a majority vote of the legal voters present and voting at

> an annual meeting . . . . Expenditures from a capital reserve fund shall be made only for or in connection with the purposes for which said fund was established or as amended as provided in RSA 35:16."

The plaintiffs do not allege that the expenditures for constructing the septic systems for the Town-owned buildings involved the purchase of land. Nor do they argue that the Town failed to name the selectmen as agents in the manner prescribed by RSA 35:3. Because the Town plainly voted to name the selectmen as agents of the Town to carry out the objects designated by the Town, we hold that, once the Town voted to design and construct the septic systems for the Town-owned buildings, the selectmen possessed sufficient authority to spend money from the capital reserve fund to pay for this project.

The final issue we must wrestle with is that of attorney's fees. The trial court found "no bad faith by the plaintiffs such that attorney's fees are justified. The claims argued by the plaintiffs and their actions in pursuing them were not unreasonable." The defendants argue that the trial court should have awarded them attorney's fees at least for the defense of the plaintiffs' suit against the selectmen as individuals, see RSA 31:104 (municipal officials immune from civil suit as individuals for actions undertaken in official capacity, absent showing of bad faith), because the plaintiffs' assertion that the selectmen acted in bad faith had no reasonable basis in fact. "There was no evidence presented to prove bad faith," the defendants claim in their brief, "nor were there any provable allegations of fact to support a claim of bad faith." Specifically, the defendants argue that, while the plaintiffs made many claims that the selectmen acted wrongfully or illegally, they made no allegation that the selectmen acted with malice or with evil intent, an essential component of "bad faith." *See Murphy v. Financial Development Corp.*, 126 N.H. 536, 542, 495 A.2d 1245, 1250 (1985) (bad faith defined as "intentional disregard of duty or an intent to injure").

In evaluating the trial court's ruling on this issue, we must

first keep in mind the tremendous deference given to a lower court's decision on attorney's fees. *See Maguire v. Merrimack Mut. Ins. Co.*, 133 N.H. 51, 54-55, 573 A.2d 451, 453-54 (1990). Next, we turn to the established law controlling the subject. The general rule in this State is that each party to a lawsuit is responsible for payment of his or her own lawyer's bill. *See Silva v. Botsch*, 121 N.H. 1041, 1043, 437 A.2d 313, 314 (1981). We have recognized exceptions to this rule "'where an individual is forced to seek judicial assistance to secure a clearly defined right' if bad faith can be established," *Funtown v Town of Conway*, 127 N.H. 312, 315, 499 A.2d 1337, 1339 (1985) (quoting *Harkeem v. Adams*, 117 N.H. 687, 691, 377 A.2d 617, 619 (1977); *see also Indian Head National Bank v. Corey*, 129 N.H. 83, 88, 523 A.2d 70, 73 (1986); "where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct," *St. Germain v. Adams*, 117 N.H. 659, 662, 377 A.2d 620, 623 (1977); as "compensation for those who are forced to litigate in order to enjoy what a court has already decreed," *Keenan v Fearon*, 130 N.H. 494, 502, 543 A.2d 1379, 1383 (1988); *see Indian Head National Bank v. Corey*, *supra* at 86, 523 A.2d at 72; and "for those who are forced to litigate against an opponent whose position is patently unreasonable," *Keenan v. Fearon supra*.

> "Thus we have recognized a constitutionally created court's power to award counsel fees in any action commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be."

Keenan v. Fearon supra.

Applying these standards to the case before us, and keeping in mind the deference we must accord the trial court, we cannot say that the court's decision was in error. Even assuming that the plaintiffs failed to explicitly allege malice or evil intent on the part of the selectmen, we are not aware of a holding by this court, or any other, that allows an award of attorney's fees

merely because a party fails to properly plead every element of a claim. The proper remedy for such unartful pleading is a dismissal of the claim, not payment of attorney's fees. *See* R. Wiebusch, 4 *New Hampshire Practice, Civil Practice and Procedure* §§ 346, 353(a), at 245, 247 (1984). Attorney's fees can only be awarded when the claim has "no reasonable basis in the facts provable by evidence, or . . . in the law as it is, or as it might arguably be held to be." *Keenan v. Fearon supra*. We think that the trial court could have properly reviewed the plaintiffs' several requests for findings of fact, alleging specific wrongful, illegal actions on the part of the selectmen, noted the heading "Bad Faith" preceding these requests, and correctly determined that "[t]he claims argued by the plaintiffs . . . were not unreasonable," even if ultimately decided against them. Moreover, some of the plaintiffs' requests alleged that the selectmen exceeded their statutory authority by expending the capital reserve fund to construct septic systems for Town-owned buildings. If the plaintiffs had persuaded us that this allegation was true, they would have established a colorable claim that the selectmen were not "acting in [their] official capacity in good faith and within the scope of [their] authority." RSA 31:104. Although the plaintiffs' position did not carry the day, as discussed above, resolution of the issue turned on a fine question of law never before answered by this court. We therefore cannot hold that the plaintiffs' claim lacked any "reasonable basis in the facts provable by evidence, or . . . in the law as it is, or as it might arguably be held to be." *Keenan v. Fearon supra*. We affirm the trial court's denial of attorney's fees for the defendants.

Affirmed in part; reversed and remanded in part.

All concurred.